

Kenner 08.16.11

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1 UNITED STATES SECURITIES AND EXCHANGE COMMISSION

2 In the Matter of:

3
4 DIAMANTE DEL MAR)
5) File No. NY-8125
6)

7 WITNESS: PHILIP KENNER

8 PAGES: 443 - 689

9 PLACE: Room 410
10 Securities and Exchange Commission
11 3 World Financial Center
12 New York, New York

13 DATE: August 16, 2011

14
15 The above-entitled matter came on for
16 hearing at 10:26 a.m., pursuant to subpoena.
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1 APPEARANCES:

2 On behalf of the Securities and Exchange Commission:

3
4 CHRISTOPHER CASTANO, ESQ.
5 JUSTIN SMITH, ESQ.
6 GEORGE N. STEPANIUK, ESQ., Assistant Regional
7 Director
8 Enforcement Division
9 Securities and Exchange Commission
10 3 World Financial Center
11 New York, New York 10281
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15 On behalf of the witness:

16
17 MICHAEL STOLPER, ESQ.
18 Law Offices of the Stolper Group
19 155 Avenue of the Americas
20 New York, New York 10013
21 212-337-3502
22

23 ALSO PRESENT: Peter Scutero, Intern
24
25

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1 P R O C E E D I N G S

2 MR. CASTANO: We are on the record on
3 Tuesday, August 16, 2011 at 10:26 a.m.
4 Mr. Kenner, welcome back.

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5 Just like last time, the Formal Order of
6 Investigation which was put before you shortly before
7 we began, authorizes me to administer the oath at
8 this time.

9 Please raise your right hand.

10 Whereupon,

11 PHILIP KENNER,
12 after having been first duly sworn, was examined and
13 testified as follows:

14 EXAMINATION

15 BY MR. CASTANO:

16 Q. Just like last time, I am going to ask
17 you a few general introductory questions and go over
18 the parameters of an SEC testimony.

19 Please state and spell your name for the
20 record.

21 A. Philip Andrew Kenner, P-H-I-L-I-P,
22 A-N-D-R-E-W, K-E-N-N-E-R.

23 Q. Mr. Kenner, as we discussed last time,
24 for purposes of SEC investigations, nothing is really
25 off the record, so any time we go off the record and

0446 1 we have a substantive conversation, it will be
2 summarized when we go back on.

3 Do you understand?

4 A. I understand.

5 Q. The Commission controls the record. Any
6 requests to go off the record should be made by me.
7 For example, if you needs to use the restroom, just
8 say, "Can we go off the record?"

9 If there is a question pending, I will
10 ask that you answer the question before we go off the
11 record. The court reporter, of course, can take down
12 everything that we say, but with the machine here,
13 obviously, the court reporter can't write down verbal
14 gestures such as a head nod to indicate yes or
15 shaking your head to indicate no. So I would ask, as
16 we did last time, I ask that you give your answers in
17 a clear, vocal manner.

18 Do you understand?

19 A. I understand.

20 Q. Try not to answer any question until I
21 finish asking the question, and I will, of course,
22 return the courtesy. The record will be much clearer
23 if only one person is speaking at a time.

24 Of course, if you do not understand a
25 question, I am sure your very competent counsel will

0447 1 speak up and say, "Chris, we didn't understand the
2 question," but if he doesn't and you don't understand
3 a question, let me know and I will rephrase the
4 question.

5 As you know, my name is Chris Castano,
6 and with me is Justin Smith. We are both members of
7 the New York Regional Office of the United States
8 Securities and Exchange Commission. Only one person
9 today will ask you a question at a time. So if
10 Justin asks you a question, answer that question. He
11 might ask you a bunch of follow-up questions. Same
12 thing with me. We will not be asking you questions
13 at the same time.

14 George Stepaniuk may also join us at
15 some point.

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16 This is an investigation by the United
17 States Securities and Exchange Commission in the
18 matter of Diamante del Mar, that's NY-8125, to
19 determine if there have been violations of the
20 federal securities laws. However, facts gathered in
21 this investigation might constitute violations of
22 other state or federal civil and criminal statutes.
23 Prior to the opening of the record, you
24 were given a copy of the Formal Order and Exhibit 1,
25 that's the SEC's Supplemental Information Form 1662.

0448 1 Did you have an opportunity to review
2 both documents?

3 A. Yes.

4 Q. Are you being represented by counsel
5 today?

6 A. Yes.

7 MR. CASTANO: Will counsel please
8 identify himself for the record?

9 MR. STOLPER: Michael Stolper
10 representing Phil Kenner. And with me is Peter
11 Scutero, S-C-U-T-E-R-O. He is an intern with me this
12 summer.

13 MR. CASTANO: Just so that the record
14 is clear, the intern is here observing but will not
15 be participating.

16 Q. Mr. Kenner, are you taking any
17 medication or drugs that would affect your ability to
18 recall or answer questions truthfully?

19 A. No.

20 MR. CASTANO: Michael, are you appearing
21 in any other capacity other than Mr. Kenner's legal
22 counsel?

23 MR. STOLPER: No.

24 Q. We will jump around different topics
25 today. There might be some ground that we covered

0449 1 last time where we might have to go through some
2 introductory questions, but it is my goal to try to
3 focus in on covering new ground today. So let's just
4 begin with some follow-up questions.

5 On Diamante del Mar and Cabo San Lucas,
6 do you recall whether you provided any members or
7 investors that were your clients with a Diamante del
8 Mar private placement memo or other offering
9 document?

10 A. Yes.

11 Q. Do you know when you provided them with
12 those documents?

13 A. I do not recall.

14 Q. Did you provide them with the documents
15 at the time that they made their investment?

16 A. To the best of my recollection, yes.

17 Q. Was that for both Diamante del Mar and
18 Cabo San Lucas?

19 A. I don't recall.

20 Q. Where did you receive the Diamante del
21 Mar private placement memo?

22 A. Any subscription documents or PPOs that
23 I may have received would have come directly from
24 Bill Najam or Larry Markowitz, the two attorneys
25 representing the Ken Jowdy, J-O-W-D-Y, on the

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1 project.

2 Q. Can you spell Markowitz and Najam.

3 A. Najam is N-A-J-A-M, William Najam. And
4 Larry Markowitz is M-A-R-K-O-W-I-T-Z.

5 Q. And the offering documents for Cabo San
6 Lucas, did you also receive them from those two
7 individuals?

8 A. Any information regarding the Cabo San
9 Lucas investment, I would have received from one of
10 those three gentlemen, Jowdy Najam or Markowitz.

11 Q. Just so the record is clear, for both
12 entities, Diamante del Mar and Cabo San Lucas, do you
13 recall whether you gave those offering documents to
14 your clients before they made their investment, at
15 the time they made their investment, or after they
16 made their investment?

17 A. I don't recall specifically.

18 Q. Is there any documents such as an e-mail
19 or any type of letter you might have sent that might
20 have this information contained in it?

21 A. Not that I recall.

22 MR. STOLPER: Chris, hang on one
23 second.

24 (Witness and counsel confer off the
25 record.)

0451 1 A. To just clarify, there were a number of
2 members of the Diamante del Mar project who would
3 have received any and all of the subscription
4 agreement or private placement offerings directly
5 from directly Jowdy, Najam or Markowitz, not through
6 me.

7 Q. Were any of your clients any of those
8 investors?

9 A. Yes.

10 Q. So there were clients of yours that
11 would have received document directly from Jowdy and
12 Najam?

13 A. Correct. In fact, the first two
14 investors, Byron Dafoe and Jason Allison, I don't
15 what they received from Ken Jowdy. Because I
16 actually met Ken Jowdy through those two gentlemen
17 after they told me they were investing with him.

18 BY MR. SMITH:

19 Q. How do you know that subsequent
20 investors who were your clients received offering
21 documents from Jowdy or Najam?

22 Do you understand my question?

23 A. I don't.

24 Q. Let me backtrack.

25 I thought you just testified that some
0452 1 of your clients received offering documents not from
2 you but from either Najam or Jowdy.

3 A. Correct.

4 Q. How do you know?

5 A. No. To be clear, in case it wasn't in
6 prior testimony, I am suggesting that I don't know
7 what Byron Dafoe or Jason Allison received from Ken
8 Jowdy because they were his friends and dealt
9 directly with him.

10 Q. And the question is: Putting aside
11 Dafoe and Allison, were there any other of your

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12 clients who received offering documents from either
13 Jowdy or Najam?

14 A. Directly?

15 Q. Yes.

16 A. I believe yes.

17 Q. What is that belief based on?

18 A. The belief is based on the fact that
19 Jowdy had direct communication with a number of
20 clients before, during and after their site visits,
21 before during and after they had invested in the
22 project, Ken Jowdy's project.

23 Q. But how do you know that he provided
24 them with offering documents?

25 A. My assumption is based in the

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1 understanding that none of them ever asked me after
2 the fact that they were supposed to receive anything
3 from Ken Jowdy, so my assumption was that they
4 received documents from Markowitz, Jowdy or Najam,
5 they handled them directly on their own and sent them
6 back and subsequently asked me to assist in the
7 transfer of funds.

8 Q. Let me make sure I understand the basis
9 for your belief that they received them directly.
10 Your basis is, number one, that they had
11 communications not including you with your clients
12 and Jowdy and Najam. And, number two, they didn't
13 ask you for offering documents?

14 A. Correct.

15 Q. Did your clients that received documents
16 that you believe from Najam or Markowitz or Jowdy,
17 did they ever say to you or do you remember them ever
18 saying, "Hey, I received a bunch of offering
19 documents for Diamante del Mar," or Cabo San Lucas?

20 A. I don't recall specifically.

21 Q. Do you recall if they ever called you up
22 and said, "Hey, I read page 3 of whatever offering
23 documents I received and I have some questions"?

24 Did they ever ask you questions about
25 documents that they received?

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1 A. Not that I recall.

2 Q. For the clients that -- besides the two
3 clients you mentioned, the other clients and perhaps
4 some other, I guess for the clients that --
5 withdrawn.

6 For the clients that you did provide
7 private placement memos or other offering documents
8 concerning Diamante del Mar and Cabo San Lucas, is it
9 your testimony for both entities that you don't
10 recall specifically when you gave them these offering
11 materials?

12 A. I don't recall.

13 Q. And did you retain any documents that
14 you gave your clients such as the offering materials?

15 A. I did not retain any of them. Although,
16 after they were signed and executed, I believe Bill
17 Najam used to send me copies of each of those
18 documents.

19 Those documents were subsequently stolen
20 from my office in around 2006, 2007. And in 2007,
21 prior to the dissension between Jowdy, Najam and
22 myself when I discovered that they had been stealing

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23 budget money from Cabo San Lucas, I had requested
24 that Bill Najam send along a full copy of documents
25 for all of the investors that I believed were in the

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1 Diamante del Mar and Cabo San Lucas. And those, that
2 package that Najam sent me, were forwarded on to each
3 of the individual investors.

4 A. You mentioned that those documents were
5 stolen. I think we talked little about this last
6 time.

7 where were they stolen from?

8 A. From my office in Scottsdale, Arizona.

9 Q. Did you file a police report?

10 A. I did not.

11 Q. And you believe it was in '06 or '07?

12 A. That's correct.

13 Q. Why didn't you file a police report at
14 the time about the stolen documents?

15 A. There has been lot of things stolen and
16 my home has been vandalized, since I started
17 litigation against Ken Jowdy and Tommy Constantine,
18 and I am just tired of calling the police to my home.

19 Q. The question is: why didn't you report
20 these documents being stolen in '06 or '07 to the
21 police department?

22 A. I don't recall.

23 Q. Have you ever reported any theft at your
24 house to the police department?

25 A. Yes.

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1 Q. Do you recall when the first time is you
2 reported a theft?

3 A. I don't recall. Perhaps around 2008 and
4 as recent as a week and a half ago.

5 BY MR. SMITH:

6 Q. So prior to the theft in 2006 or 2007,
7 you hadn't reported any -- well, had there been any
8 thefts prior to 2006 and 2007 thefts from your office
9 of executed documents?

10 A. Never. All of the documents ended up in
11 the possession of Michael Beeks, so somebody working
12 and assisting him, and he was Owen Nolan's attorney.

13 BY MR. CASTANO:

14 Q. Stolen property ended up in the
15 possession of an attorney?

16 A. That's correct.

17 Q. How do you know that?

18 A. He acknowledged that he had all of my
19 stolen information in depositions that occurred in
20 California in the Kenner versus Myrick case,
21 M-Y-R-I-C-K. And I forwarded those depositions on to
22 you.

23 Q. Did you pursue with any criminal
24 authority that an attorney had somehow orchestrated
25 the theft of your documents?

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1 A. I did not.

2 Q. What were his exact words, did he say,
3 "I caused these documents to be stolen from Kenner"?

4 A. He acknowledged in deposition, which,
5 again, I turned over to you, that he had documents
6 that were known to be stolen. He reviewed them and
7 didn't feel he needed to return them to me.

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8 Q. Did you ever report that to any criminal
9 authority?

10 A. I did not.
11 (Witness and counsel confer off the
12 record.)

13 MR. STOLPER: Chris, I think the last
14 time you elicited the testimony from him as to who he
15 believed stole the documents, but you may want to for
16 purposes of today's transcript, elicit that.

17 It was in that case, by the way, where
18 Beeks stated in a deposition record what you just
19 testified to?

20 THE WITNESS: Yes.

21 MR. STOLPER: Phil was represented by
22 counsel.

23 Q. I believe you mentioned the documents
24 were stolen by a woman named Myrick?

25 A. That's correct.

0458 Q. What is her first name?

1 A. Christine.

2 Q. And you never reported her theft to any
3 police or criminal authorities, did you?

4 A. I did not.

5 Q. I want to shift gears and talk about
6 Standard Advisors, Inc., and is there a difference
7 between Standard Advisors, Inc. and Standard
8 Advisors, LLC?

9 A. There is not.

10 Q. What is Standard Advisors, Inc.?

11 A. A business manager company.

12 Q. Were you the owner?

13 A. Yes.

14 Q. What was your affiliation, if any with
15 the company besides ownership? Did you have a
16 title, were you managing member, officer?

17 A. I don't know specifically.

18 Q. Were you president?

19 A. I just assumed I was the owner and
20 operated as such.

21 Q. Was Ms. Myrick employed there with you?

22 A. Yes, she was.

23 Q. Did you have any other employees?

24 A. Stephanie Dixon, D-I-X-O-N.

0459 Q. And what were her duties and
1 responsibilities, if any?

2 A. They were the same as Christine Myrick
3 as office manager.

4 Q. What did the duties of office manager
5 entail?

6 A. Pay bills for the clients, assist in
7 paperwork and transactions, deal with the clients
8 and/or their wives on day-to-day communications.
9 They would help place insurance policies, they would
10 facilitate real estate transactions. In general,
11 they were the back office staff as I traveled to deal
12 with clients face-to-face.

13 Q. Any other employees?

14 A. Not that I recall.

15 Q. I want to shift gears now and talk a
16 little bit about certain of lines of credit.

17 Generally, what do you understand a line

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19 of credit to be?

20 A. An extension of bank debt.

21 Q. Have you ever established lines of
22 credit on behalf of anyone?

23 A. I am not sure I understand specifically
24 the question.

25 Q. Have you ever participated in

0460 1 establishing a line of credit on behalf of any of
2 your clients?

3 A. Yes, I have.

4 Q. Can you tell me about that.

5 A. Many of my clients from time to time
6 have needed to establish lines of credit either for
7 personal reasons or business reasons. And as their
8 business manager, I would help facilitate that
9 through whichever banking source they needed or
10 requested that I do so. If they didn't have a
11 banking source to do it, they would ask me to assist
12 in finding a banking source to do so.

13 Q. Between 2004 and 2007, how many of your
14 clients established lines of credits, to your
15 knowledge?

16 A. Approximately ten.

17 Q. Do you know what the purposes of your
18 clients lines of credit were?

19 A. It varied from personal and business
20 reasons, for their own benefit and/or several were
21 established to acquire a larger equity percentage in
22 our Hawaii real estate development project.

23 Q. For the business and acquisition of
24 Hawaiian real estate, were there any written
25 agreements concerning the purpose of the line of

0461 1 credit as it pertained to acquiring Hawaiian lands?

2 A. I am not sure I understand the scope of
3 the question.

4 Q. Let me ask you this: You mentioned just
5 now that there were lines of credit established to,
6 among other things, purchase or acquire Hawaiian
7 lands.

8 Were there any written agreements
9 concerning using lines of credit to purchase Hawaiian
10 lands?

11 MR. STOLPER: Chris, I think he is
12 having trouble understanding the question.

13 A. I don't understand the breadth of it.

14 Q. I will take it step by step.

15 You helped your clients establish lines
16 of credit between 2004 and 2007; is that correct?

17 A. I believe that's correct.

18 Q. And your testimony here now is that,
19 among other things, lines of credit were used to
20 acquire Hawaiian land; correct?

21 A. The lines of credit were established by
22 the clients to acquire a larger equity stake in our
23 Hawaiian real estate company.

24 Q. And the question is: The equity stake
25 that your clients acquired through the lines of

0462 1 credit, were there any written documents
2 memorializing just that, that lines of credit would
3 be used to acquire equity shares in the Hawaiian

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land?

A. There were operating agreements that reflected the varying contributions for equity which represented the different amounts that lines of credit were established for.

Q. So besides the operating agreements was there any specific document that stated what a line of credit could be used for including the acquisition of equity shares in Hawaiian land?

A. I believe the operating agreement was the document that was used to represent what the Hawaiian entities could use.

Q. Are you talking about the Little Isle IV operating agreement?

A. Yes.

Q. And the Little Isle IV operating agreement specifically has provisions in there about lines of credit and what lines of credit can be used?

A. I don't believe it mentioned lines of credit.

Q. Sitting here today, so we are clear, are you aware of any document that discusses lines of

credit and the acquisition of equity shares in Hawaiian property besides any operating agreement by Little Isle IV?

A. Not that I am aware.

MR. STOLPER: Can I just float an objection because the question assumes a premise that doesn't seem to make sense to me.

MR. CASTANO: I think the record is clear, but your objection is noted.

Q. Did you ever use any portion of any line of credit from your clients to pay down other clients' lines of credit?

A. The lines of credit were used for all operational expenses for any number of the Hawaiian LLCs, which may from time to time have included the company's obligation to pay for monthly interest payments on those lines of credit.

Q. Just so that we are clear, when a line of credit was used to pay another line of credit of another client, every single penny of that money was used to reverse the line expenses?

A. Can you ask the question again?

Q. Yes.

When any portion of any line of credit was used by one client to pay another client's line

of credit, was all of that money reimbursement for Hawaiian project expenses?

MR. STOLPER: That's assuming you testified one person's line of credit was used to pay off someone else's line of credit. I don't know if that's true. I didn't hear that.

A. Can you ask it one more time to make sure it is clear?

Q. All right.

MR. STOLPER: Why don't he repeat it.

(Record read.)

A. It was for the purpose of any operational expenses on behalf of the Hawaiian entity.

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Q. So the answer is none of that money -- to that specific question, the money was, in fact, used to reimburse Hawaiian property expenses?

A. If I understand the question correctly, I think it is yes.

Q. So when there is a line of credit coming in and that money is being used to pay another line of credit by another one of your clients, do you understand that step-by-step money comes in from one line of credit is then going out to pay another line of credit for one of your clients, that is money that

is being used to reimburse Hawaiian development costs?

A. Correct, the monthly expenses for the lines of credit were the obligation of our Hawaiian real estate project.

Q. Just so that we are clear --

MR. STOLPER: I was just going to say, we did this last time, and I want to make sure, you keep referring to investors in Hawaii and Cabo and TDM as his clients.

If you are doing that, my understanding is you are doing it merely for identification purposes, because there are obviously different groups of people involved. My understanding with your line of questioning is when you reference clients, it is merely for identification purposes with the understanding that in these transactions, they are not his clients, he is not acting as the business manager of clients. But these are people who, as he testified the last time, these are all people who are getting together to invest in the project.

If you are asking him separately, are you acting as a business manager and are these dealings with your clients, I will object, because

that's inconsistent with his testimony.

MR. CASTANO: I don't think I agree with what you just said, but I don't think we have to have an argument over it. The record is what the record is.

MR. STOLPER: I just want to object when you say clients --

MR. CASTANO: I understand, but I think last time Mr. Kenner went through approximately twenty clients that appear to be investors in Little Isle IV as well as investors in, or members of Little Isle IV, Diamante Cabo San Lucas and Diamante del Mar.

We can come back and go client by client for multiple testimony sessions, but I think generally there are approximately twenty clients of Mr. Kenner that were members or investors of these entities.

MR. STOLPER: Not in dispute.

MR. CASTANO: Okay, and whether they are -- I think the record is what the record is, but I think when I talk about lines of credit, I am referring to approximately ten clients of Mr. Kenner's that he just testified right now about, that there were approximately ten clients of his between

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1 2004 and 2007 that took out lines of credit.

2 The questions then were about lines of
3 credit of one of Mr. Kenner's clients, I think that
4 is clear, they are his clients, paying off another
5 member's or another client of his line of credit.

6 Mr. Kenner's testimony is, I think, that
7 money was used to reimburse Hawaiian expenses for
8 various Hawaiian projects.

9 Q. Is that correct, Mr. Kenner?

10 A. I believe that is correct.

11 MR. STOLPER: Chris, I just want to
12 make my -- I am not even objecting. It is just a
13 clarification of the line of questioning, because
14 everything you said factually I agree with. There is
15 an inference, though.

16 Chris is also husband and he is an SEC
17 attorney. If I ask a line of questions and say as an
18 SEC attorney did you buy groceries last night for
19 your wife. Yes, you are an SEC attorney and you did
20 buy groceries for your wife last night before you got
21 home. The point is the fact that you are an SEC
22 attorney is completely irrelevant to the narrative of
23 were you buying groceries for your wife last night.

24 In these questions you are saying, with
25 your clients, did your clients. All I am saying is

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1 if the reference to clients is for identification
2 purposes, then I will not have an objection to the
3 line of questioning. If the purpose of your question
4 is Phil Kenner, as a business manager for your twenty
5 clients or ten clients involved in this deal, acting
6 as a business manager, did you arrange for a line of
7 credit for use in this particular transaction, then I
8 have an objection. I don't want to slow the day down
9 by objecting to every question where you reference a
10 client.

11 Does that make sense?

12 MR. CASTANO: It doesn't make sense.

13 The record is what the record is. I
14 don't know if I fully follow what you are saying.
15 Regardless, I think the record is clear. You can
16 make your objections. There may come a time where
17 you can put this all together in some future
18 discussion, but I don't think I follow what you are
19 saying and I don't think it matters what -- I think
20 the record is what the record is. I think we are
21 making arguments here.

22 Mr. Kenner, again, has approximately
23 twenty clients. We are talking about the time period
24 2004 to 2007, approximately ten of these clients take
25 out lines of credit. I believe that's Mr. Kenner's

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1 testimony.

2 MR. STOLPER: When they did that they
3 weren't in the capacity as his clients. They were in
4 the capacity of a fellow investor in an investment.

5 MR. CASTANO: That might be fine, and,
6 again, the record is what the record is.

7 Q. But what I am seeing, Mr. Kenner, is
8 lines of credit coming in and then being used to pay
9 other lines of credit. Your testimony is that was
10 for reimbursement of various Hawaiian expenses.

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11 The question then was, to you, was every
12 single penny of one client's line of credit, when it
13 was being used to pay another client's line of
14 credit, reimbursement for Hawaiian expenses or was
15 there possibly some other expenses that were being
16 paid, I guess, regardless of what hat you were
17 wearing?

18 A. To the best of my recollection, all
19 funds that were used by any of the investors, whether
20 they were cash investors or line of credit investors,
21 were all of the funds that were deemed, in my
22 opinion, cash, the responsibility of the LLC. And
23 they were used solely for expenses related to the
24 projects and the objectives of The Hawaiian Group.

25 Q. Just so that record is clear, we see one

0470 1 line of credit of one of your clients coming in to
2 pay another line of credit of one of your clients.
3 When that happens, is it your testimony that, well,
4 that line of credit was simply being used a
5 reimbursement for Hawaiian-related expenses?

6 A. No. I want make sure we don't mince
7 words because I know we are dancing on a fence top
8 right now.

9 Q. Okay.

10 A. If an investor chose to put up a million
11 dollar line of credit, that investor, whether the
12 line of credit was ever used or not for that
13 offering, received the full representative share of
14 equity in the Hawaii project. Those funds as they
15 were used, whether it was from a line of credit or a
16 cash investment directly from themselves or another
17 investor, were used month over month for the
18 acquisition of land, for infrastructure planning,
19 survey, geo tech work, legal bills, payroll, travel
20 and entertainment expenses. Some of those
21 obligations also included The Hawaiian Group's
22 ongoing responsibility to make those monthly line of
23 credit interest payments.

24 And that was the agreement that each of
25 the line of credit people were aware of. That was

0471 1 part of the responsibility at that point in time as
2 long as the Hawaiian group was still solvent.

3 Q. Is it your testimony, then, that your
4 clients became members of Little Isle IV either by
5 making an equity investment specifically wiring
6 monies, or in the alternative, establishing a line of
7 credit which can be drawn down upon, and that through
8 establishing a line of credit, they also became
9 equity members of Little Isle IV?

10 A. I believe that's correct.

11 Q. Just so that we are very clear, when I
12 see in the bank records one client of yours line of
13 credit being paid by another client of yours line of
14 credit, that is, your testimony, was used to
15 reimburse the various Hawaiian projects?

16 A. I believe that's correct.

17 MR. STOLPER: In the abstract, that
18 sounds great, but if want to be concrete, put
19 something in front of him.

20 Q. It is your testimony now that there
21 wouldn't be any other expenses when one client's line

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22 of credit is being paid down by another client's line
23 of credit other than Hawaiian development project and
24 all that encompasses, travel, entertainment and what
25 have you?

0472

1 A. I don't know what else would fit in
2 other than expenses directly related to investments
3 that The Hawaiian Group made. Travel and
4 entertainment, ongoing operational expenses, loans to
5 Ken Jowdy, other dealings directly related and for
6 beneficial interest of The Hawaiian Group.

7 Q. Were there clients of yours that --
8 withdrawn.

9 A. In fact, at one point in time when one
10 of the line of credit guarantors named Joe Juneau
11 asked to be removed from The Hawaiian Group. He was
12 the only individual that ever requested he be removed
13 from The Hawaiian Group.

14 I happened to be with Owen Nolan at the
15 time, who had a real dislike for Juneau as a person.
16 He told me to take the money out of his line of
17 credit and pay off the Juneau line of credit to get
18 rid of him from the group. So they were all aware,
19 including Mr. Nolan, of the funds that were
20 transferred from their line of credit, although the
21 corporation was already authorized to do so.

22 Q. I understand it might be your testimony
23 that they were all aware. Are you aware that some of
24 your clients, or former clients, might dispute what
25 you just said?

0473

1 A. I am sure.

2 Q. I want to shift gears --

3 MR. STOLPER: I am going to have a
4 standing objection to the reference to clients based
5 on my explanation before, which you didn't
6 understand, but since you keep relying on the
7 transcript, I will place in transcript my standing
8 objection.

9 MR. CASTANO: That's fine.

10 Q. Just so we are clear, Mr. Kenner,
11 between 2004 and 2007 you had approximately twenty
12 clients that invested or were members of Little Isle
13 IV, Diamante Cabo San Lucas and Diamante del Mar; is
14 that correct?

15 A. That sounds approximately correct.

16 Q. And just so that we are clear, between
17 2004 and 2007 approximately, you had discussions with
18 your clients about investment opportunities in Little
19 Isle IV, Diamante del Mar and Cabo San Lucas; is that
20 correct?

21 A. That's correct.

22 (Whereupon, at this time, Mr. Stepaniuk
23 entered the room.)

24 MR. CASTANO: So the record is clear,
25 George Stepaniuk has just joined us.

0474

1 Let's go off the record at 11:02.

2 (Recess taken.)

3 MR. CASTANO: We are back on the record
4 at 11:12 a.m.

5 Q. Mr. Kenner, while we were off the
6 record, were there any substantive conversations

Page 13

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7 between the Commission staff and yourself?

8 A. There were not.

9 Q. I want to shift gears now and talk about
10 Little Isle IV. I know the last day we were together
11 we spent a little bit of time at the end talking
12 about Little Isle IV and you answered some questions.
13 Some of this might be repetitive, but there is also
14 some documents with Little Isle IV that we also want
15 to put before you and ask you questions, so let's
16 just begin, I know you talked about it a little bit
17 earlier, what is the business of Little Isle IV?

18 A. Little Isle IV was an investment group
19 that was investing in the Hawaiian real estate
20 project and other various special projects.

21 Q. When you say "other various special
22 projects," what are referring to?

23 A. One of which became loans to Ken Jowdy.

24 Q. Were there any other projects?

25 A. Not that I recall specifically.

0475 1 Q. Any other business ventures?

2 A. Not that I recall at the time.

3 Q. And what is your current position at
4 Little Isle IV?

5 A. I think I am just an investor at this
6 time in Little Isle IV.

7 Q. Was there a time that you had a
8 different position?

9 A. Yes, I was a managing member of Little
10 Isle IV for some period of time.

11 Q. When did you stop being the managing
12 member of Little Isle IV?

13 A. I don't recall specifically.

14 Q. 2008, 2009?

15 A. It was after 2006.

16 Q. Is that after there was some
17 acquisition?

18 A. Yes, that's after the joint venture with
19 Lehman Brothers.

20 Q. And prior to the joint venture with
21 Lehman Brothers, what were your duties and
22 responsibilities as a managing member of Little Isle
23 IV?

24 A. To run the day-to-day operations of the
25 Little Isle IV project.

0476 1 Q. Were there any other employees?

2 A. There were no employees of Little Isle
3 IV.

4 Q. Was there anyone else affiliated before
5 2006 with Little Isle IV?

6 A. Affiliated in what context?

7 Q. Meaning not employees, but they might
8 have been a consultant of Little Isle IV.

9 A. We paid a series of consultants between
10 approximately 2004 and the Lehman closing in 2006 to
11 assist us in market studies, sourcing funds for
12 development, sourcing funds for infrastructure and
13 build out prior to Lehman Brothers getting involved
14 with our project.

15 Q. Were those the same consultants that
16 were also trying to find hard lenders and various
17 other lenders to lend the company money?

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18 A. That's correct.
19 Q. Did Christine Myrick have any position
20 at Little Isle IV?
21 A. Christine Myrick played a few roles with
22 The Hawaii Group. She was probably, unfortunately,
23 the loudest voice box of what was going on in Hawaii
24 to induce other people to ask me about becoming
25 members ultimately, which she also became.

0477
1 Q. What does that mean? I don't
2 understand.

3 A. Christine Myrick would speak to more
4 clients on a daily basis than I would and enjoyed
5 bragging about the fact that there were several of
6 our Standard Advisor clients had become members of
7 Little Isle IV and were buying real estate in Hawaii
8 at the time, and as she would discuss that with the
9 different clients, I would subsequently receive phone
10 calls asking why those, the additional clients,
11 weren't being introduced to what we were doing in
12 Hawaii. So that subsequently led to more discussions
13 with new people who wanted to become members of that
14 entity.

15 Q. Did she have a role in fund-raising for
16 Little Isle IV?

17 A. I believe she tried to introduce --
18 strike that.
19 I believe that she tried to introduce me
20 to several hard money people. She also was one of
21 the people who introduced me to new Little Isle IV
22 members over time.

23 Q. Just so we are clear, she wasn't a
24 consultant, she wasn't an employee, but she was doing
25 what appears to be work on behalf of Little Isle IV.

0478
1 Can you just explain it to me?

2 MR. STOLPER: An employee of whom?
3 Q. Was she an employee of Little Isle IV?
4 A. She was an employee of Standard Advisors
5 but liked to talk about everything that was going on
6 to anyone that would listen to her.

7 Q. Explain to me, was she authorized to
8 speak to clients about the all different investments?
9 Explain it to me like I am a five year
10 old?

11 MR. STEPANIUK: Let's say 12.

12 Q. A 12 year old.

13 A. Christine Myrick was an office manager
14 for Standard Advisors, but through her manic behavior
15 that stemmed from either her alcohol problem, her
16 drug problem or her sex addiction, liked to make
17 herself feel very important to my different clients
18 or prospective clients of Diamante Cabo San Lucas,
19 Diamante del Mar, or The Hawaiian Group. So I am not
20 sure she was authorized or unauthorized to speak to
21 them on a myriad of issues that she chose to do so,
22 but she did speak with the clients and the wives on
23 every opportunity she could.

24 Q. Were you her supervisor?

25 A. I was.

0479
1 Q. Were you aware she was speaking to
2 clients about Little Isle IV?

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3 A. I had asked her on several occasions to
4 stop promoting and talking to people about the
5 business that was outside the scope of her daily
6 responsibilities.

7 Q. What did she say to you?

8 A. She would typically apologize, ask for
9 forgiveness, and over approximately a 24 to 36 month
10 period of time, that became her pattern. Whether it
11 was with alcohol problems, drug problems, sex
12 addiction problems with my clients, or talking out of
13 school to a number of clients, to the point where
14 over a 12 month -- excuse me, over a six-month period
15 of time she was able to maintain and keep her job but
16 she was restricted from communication directly with
17 any of the clients as a condition of her continued
18 employment.

19 She ultimately violated that by sleeping
20 with two more of my clients and was subsequently
21 fired and vowed vindication on me.

22 Q. When did she leave Little Isle IV?

23 A. She was never a member. She was an
24 employee --

25 Q. When did leave Standard Advisors?

0480
1 A. She was told about her termination in
2 December of '06 or November of '06. She was told by
3 me that I would help her find new employment, but a
4 condition of that would be that she couldn't speak
5 with the clients because of her manic state. I had
6 heard many rumors that she had spread leading up to
7 that, one of which was about her breast cancer being
8 the reason that she was being terminated.

9 Q. So she left in December or November '06?

10 A. She was ultimately terminated in
11 February '07, but I continued to pay her and try to
12 help her find a job.

13 Q. Did she ever receive any compensation
14 for her solicitation efforts for Little Isle IV?

15 A. She was never an authorized solicitor of
16 Little Isle IV, although --

17 Q. That wasn't the question.

18 The question was: Did she ever receive
19 any compensation for her efforts in speaking to
20 clients of Standard Advisors about Little Isle IV?

21 A. No.

22 Q. Did she make an investment in Little
23 Isle IV?

24 A. She did.

25 Q. How did she make her investment, with
0481 her own money or did she get money from someone?

2 A. Her own money.

3 Q. How much money did she invest?

4 A. \$25,000.

5 Q. Do you know where she got the \$25,000?

6 A. I believe she got it from a divorce
7 settlement.

8 Q. Are you an investor in Little Isle IV?

9 A. I am.

10 Q. When did you become an investor in
11 Little Isle IV?

12 A. I was one of the original investors in
13 Little Isle IV. Subsequently, after I sued her for

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slander and defamation, I bought her out of that investment to remove her from all the activities that related to my existing clients.

Q. When was the time period when you became an original investor in Little Isle IV?

A. When Joe Juneau and Owen Nolan and I were originally involved in the project in around 2002, 2003.

Q. So it was you, Joe Juneau, who else?

A. Owen Nolan.

Q. Anyone else?

A. John Kaiser. We were the four original

investors.

Q. How much did each individual invest?

A. I don't recall.

Q. Did you invest your own money or did you invest someone else's money?

A. My own money.

Q. Where did you get the funds to make an investment Little Isle IV?

A. Savings and income.

Q. Did Little Isle IV have any corporate offices or were they just located at your office at Standard Advisors in Scottsdale?

A. At Standard Advisors' location.

Q. Was Little Isle IV formed around the time of the original four investors making an investment?

A. Yes, it was.

Q. And the original four investors who made an investment, what was their percentage ownership of Little Isle IV?

A. I don't recall.

Q. Was it 25 percent each or was it some other percentage breakdown?

A. I don't recall.

Q. Do you know if you owned 99 percent of

the company and they owned one third of one percent?

Do you have any idea of how much?

A. I am sure I didn't own 99 percent and I can split the remaining members at one third, one third and one third of a point each.

Q. Do you know if you owned more than 50 percent of Little Isle IV?

A. As I sit here today, I really don't recall.

Q. Do you know if Little Isle IV is incorporated?

A. I don't know.

Q. Do you know if there are documents that would have that type of information?

MR. STOLPER: Do you know what incorporated means?

THE WITNESS: No.

MR. STOLPER: Did you ever create a LLC that became Little Isle IV?

THE WITNESS: Yes.

MR. STOLPER: You filed papers in what state?

THE WITNESS: Delaware.

MR. STOLPER: So the answer to the

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25 question is yes, it was incorporated.
0484

1 A. I misunderstood.

2 BY MR. SMITH:

3 Q. Was it an LLC?

4 A. It was an LLC.

5 BY MR. CASTANO:

6 Q. Do you know where it was incorporated as
7 an LLC?

8 A. In Delaware.

9 MR. STEPANIUK: You could say formed.

10 THE WITNESS: Formed would be a word I
11 would use. Thanks, George.

12 Q. In early 2002, 2003, when there were
13 four initial investors, did you receive any
14 consulting fees or any fees from Little Isle IV
15 itself?

16 A. I don't believe so.

17 Q. Do you know if anyone received any
18 consulting fees from Little Isle IV?

19 A. I don't believe so.

20 Q. At any time after the initial investment
21 by the four investors including yourself, were any
22 persons employed temporarily by Little Isle IV,
23 meaning you brought in a president or officer, until
24 the time of the acquisition or arrangement between
25 Little Isle IV and Lehman Brothers?

0485
1 A. I don't believe so.

2 Q. Do you know if Little Isle IV had
3 audited financials prior to the acquisition by Lehman
4 Brothers?

5 A. I don't recall specifically but Lehman
6 Brothers requested all of our banking statements
7 leading up to the acquisition. The joint venture,
8 excuse me, to be clear.

9 Q. Before the joint venture, do you recall
10 if there were any audited financials of any Little
11 Isle IV entities?

12 A. I don't believe so.

13 Q. Do you ever recall hiring an accounting
14 firm or CPA firm to perform any type of accounting
15 services for Little Isle IV prior to the joint
16 venture with Lehman Brothers?

17 A. I don't believe so.

18 Q. Do you know if Little Isle IV is
19 registered with the SEC or any other regulatory
20 organization?

21 A. I am not aware.

22 Q. Just so we are clear, there were four
23 investors in Little Isle IV. You were at the time
24 the managing member?

25 A. Yes.

0486
1 Q. Were you compensated at all for being
2 managing member?

3 A. I was not.

4 Q. Did Little Isle IV maintain bank
5 records?

6 A. Yes.

7 Q. Do you know where they maintained bank
8 records?

9 A. Yes.

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10 Q. Where was that?
11 A. Northern Trust Bank in Phoenix, Arizona.
12 Q. Did that ever change over time?
13 A. I don't believe so.
14 Q. Was there only just one bank account for
15 Little Isle IV?
16 A. To the best of my recollection.
17 Q. Did there ever come a time that you
18 discussed an investment opportunity in Little Isle IV
19 with any of your clients?
20 MR. STOLPER: Can I get that read back?
21 (Record read.)
22 MR. STOLPER: Same objection as before.
23 A. To the best of my recollection, I would
24 have clearly discussed what we were doing in Hawaii
25 with any one of my friends or clients that asked what
0487 we were doing in Hawaii. With Owen Nolan and Joe
Juneau at the time.
3 BY MR. STEPANIUK:
4 Q. Is that in addition to calls that you
5 got after Christine had told people on the phone
6 about Little Isle IV?
7 A. Can you just say the first part again?
8 Q. Yes. Is that in addition to
9 conversations you may have had with people told about
10 Little Isle IV by Christine, as you testified
11 earlier?
12 A. I don't recall where basically all of
13 the clients originally heard about it. But if you
14 are asking me to guess where most of them heard about
15 it, it was from Christine and her desire to promote
16 what Owen and Joe Juneau and I were doing in Hawaii.
17 Q. Just so it is clear, you came to learn
18 of her activities in that regard because then you got
19 phone calls from people you knew who wanted to invest
20 in Little Isle IV having talked to Christine?
21 A. That's correct.
22 And in addition, she held a real estate
23 license and wanted to pursue becoming a real estate
24 broker or agent in Hawaii in order to capture the
25 real estate commissions. That was one of her goals
0488 in promoting the activity in Hawaii.
Q. Mr. Kenner, we can go through each
investor or member of Little Isle IV, but did there
come a time that you had a discussion with Brian
Berard about an investment opportunity in Little Isle
IV?
A. Yes, I spoke with Brian about what Joe
Juneau and Owen Nolan and I were doing in Hawaii.
Q. And when was that?
A. I don't recall.
Q. Do you know what you told him about an
investment opportunity in Little Isle IV?
MR. STOLPER: Objection. He is
characterizing your testimony as describing an
investment opportunity. If that's accurate, answer
the question. If it is not, you need to respond
accurately.
A. As each of my clients had become friends
over time, they were always interested in what I was
doing. So I don't believe that I was telling them

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21 about an investment opportunity that they needed to
22 be a part of. All of my guys were interested in what
23 I did all the time, whether it was travel with a
24 tennis tour, give financial lectures, go to schools,
25 give financial seminars to sports majors, or whether

0489 1 it was being involved with a real estate project in
2 Mexico or Hawaii.

3 Q. Did there ever come a time that you had
4 a conversation with Brian Berard about investing in
5 Little Isle IV?

6 A. To be clear so we don't have to go
7 through the whole list, any individual who ultimately
8 invested in Little Isle IV had a conversation with me
9 about what was going on in the real estate project in
10 Hawaii.

11 Q. What did you say to -- let's just take
12 Mr. Berard, if anything, about Little Isle IV and an
13 opportunity to perhaps be a member of Little Isle IV?

14 A. Whether I was speaking with Mr. Berard
15 or anybody else, I would clearly outline and define
16 our desire to purchase raw land in Hawaii and
17 ultimately turn around and either develop or sell the
18 land for a profit.

19 Q. And would you tell them that prior to
20 them making -- prior to them becoming a member of
21 Little Isle IV?

22 A. I can't imagine any other way they would
23 become a member if they didn't know what was going
24 on.

25 Q. What else, if anything, did you say to
0490 1 Mr. Berard about becoming a member of Little Isle IV?

2 A. I don't recall.

3 Q. Did you discuss with him that monies
4 would be used, at the time Mr. Berard made his
5 investment, for other projects?

6 A. Depending on when someone became a
7 member of Little Isle IV and wanted to ask what the
8 scope of the Hawaii projects were, if there were, as
9 an example, loans at the time outstanding to Ken
10 Jowdy, that would have been discussed. In as much as
11 we would have had a conversation about land that
12 already been purchased in Hawaii, our ongoing
13 infrastructure efforts and our ongoing funding
14 effort.

15 Q. At the time Mr. Berard became a member
16 of Little Isle IV, was he given any documents by you
17 about Little Isle IV?

18 A. I don't recall.

19 Q. Was he given the by-laws of Little Isle
20 IV?

21 A. Every document that we had available,
22 and specifically by-laws and operating agreements for
23 Little Isle IV or any of the other Hawaiian entities,
24 were given to all of the investors.

25 Q. Were they given to the investors prior
0491 1 to them becoming members or actually purchasing
2 membership interest in Little Isle IV?

3 A. Absolutely.

4 Q. Do you know who gave them those
5 documents?

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A. It would have been me.

Q. Would there have been anyone else?

A. Not that I recall. Although I may say Christine Myrick may have delivered packages to individuals.

Q. Are you aware of anyone who, putting aside conversations you might have had with your clients or members of Little Isle IV, are you aware of any other individual or group of individuals that were actively trying to solicit investment opportunities in Little Isle IV?

A. I don't know anyone, including myself, that was actively trying to solicit new members into Little Isle IV.

Q. So Ken Jowdy wasn't out there soliciting investment opportunities in Little Isle IV?

A. I don't know. Not that I am aware of.

Q. And you are not aware of anyone else?

A. I am not aware of conversations that I was not a part of.

Q. At the time Mr. Berard made an investment in or became a member of Little Isle IV, do you know if you had a discussion with him concerning how much money he was going to invest and what he would receive in exchange for his investment?

A. I believe, whether it is Mr. Berard or any of the ultimate members of Little Isle IV, they would have received by-laws or operating agreements for Little Isle IV, and it would have been represented to them that based on whatever they chose to invest, the new partnership breakdown of equity would occur.

Q. Did you have that conversation with them?

A. With each and every one.

Q. So they would say I am investing X amount. That means you will get a certain of percentage of the LLC back; is that correct?

A. That sounds correct.

Q. Do you recall specifically having those conversations with a certain of number of your clients between 2004 and 2006?

A. Every one of them would have had that conversation to be very clear. There was no misunderstanding about what they were asking to get

involved with.

Q. Did you have any conversations with any of your clients or members of Little Isle IV prior to them making or becoming a member about their principal and whether their principal was safe?

A. Again, and I think we touched on this the last time I was here, using the word "safe" would not have come out of my mouth as far as an investment goes. It would be incredibly uncharacteristic for me to categorize anything as safe since I was a risk manager for those people.

Q. Just so it is clear, is it your testimony that you never told any member of Little Isle IV that they would not lose their principal investment in Little Isle IV?

A. Absolutely not.

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Q. Besides discussing with members of Little Isle IV who became members of Little Isle IV prior to them making their investment the fact that monies were going to be used to acquire Hawaiian land and to make loans, did you have any other conversations with your clients about Little Isle IV?

A. We talked about a series of potential special projects that would be related to Little Isle IV, in addition to ongoing loans that were

outstanding for the benefit of the company, and the purchase of the lands and potential development of those lands.

Q. Besides those two, the development of Hawaiian land as well as loans on behalf of Little Isle IV to other entities and special projects, were those -- and this is a long-winded question -- were those items discussed prior to a Little Isle IV member becoming a member?

A. Again, I think answered this in a similar question earlier, but the entire scope of what was going on with Hawaii would be discussed with anybody that wanted to ask about it, whether they became a member ultimately or not, at their request. The entire scope of current projects, future scope projects, special projects, which would include the likes of coffee farming, a water bottling company with Hawaiian water, a nursery and landscape project, a solar project, all related to the Hawaiian entities. They were all discussed at length and ad nauseam.

Q. Prior to someone becoming a member Little Isle IV?

A. Always prior.

Q. Do you know how much money was raised

from members of Little Isle IV in total?

A. As I sit here today, my best guess is between ten and twelve million dollars.

Q. So the record is clear, is that approximately?

A. Yes.

Q. The things that you just described, the various projects to acquire land, develop a nursery, some solar power, were these things ever memorialized in writing, be it in a prospectus or e-mail to any of your clients?

A. No. The entire scope of the projects that were ongoing were future consideration projects, were all discussed face-to-face with the clients, with the members or future members.

Q. Why didn't you ever put any of that in writing, those projects, those special projects you discussed?

A. Primarily because I would spend upwards of 300 days a year on the road, sitting in living rooms of my clients. And they would prefer to have hours and hours of conversation about what was going on as opposed to read a three to five-page document summarizing it.

In fact, in Owen Nolan's testimony in

our arbitration, he claims he hasn't read a document

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in twenty years, although I brought documents after documents after documents to him. So we are not dealing with a sophisticated business individual. These were ongoing dynamic conversations that made them feel good about what we were doing.

Q. After a member acquired an interest in Little Isle IV, did you have conversations with them about the project?

A. Ongoing and all the time. During these years I used to spend over 10,000 minutes a month on the phone talking to my clients endlessly about these issues and their own personal business issues.

Q. Can you tell me about what you told members of Little Isle IV about loans that Little Isle IV was making?

A. Loans to Ken Jowdy.

Q. Were there other loans?

A. I believe that's it.

Q. Can you tell me about that?

A. I told them in 2004/2005 that Ken Jowdy had approached us about lending money to him. He had proposed to pay us 15 percent interest on the money, and it would be recapitalized when Ken Jowdy was able to acquire financing either on the Diamante del Mar

project, which had been ongoing, or the Diamante Cabo San Lucas project at the closing with Lehman Brothers. And every member to a person was thrilled about the opportunity to do that.

Q. The loan with -- between Little Isle IV and Ken Jowdy, was that memorialized in any way in writing?

A. Yes, it was.

Q. There is a document that has the loan in it?

A. Yes.

Q. And it has the terms of 15 percent interest?

A. Yes, it does. And it was turned over to you guys.

We ended up loaning Ken Jowdy approximately \$7 million over that period of time and he repaid us under the terms of the agreement approximately \$2 million, and then ultimately refused to continue paying after he closed the Cabo San Lucas deal.

Q. Is there any dispute over the authenticity of the loan document?

A. Yes, there is.

Q. Was there any e-mail of that loan

document sent at the time of the loans?

A. Not that I am aware of.

Q. Was that loan document provided to any of Little Isle IV members?

A. I don't recall.

Q. Do you know if that loan document was provided to Lehman Brothers prior to or during their due diligence in late 2005 and 2006?

A. I can only imagine it was because Masood Bhatti was the loan manager at Lehman Brothers had agreed to capitalize Ken Jowdy's equity position in the Cabo San Lucas project to come up with the \$7

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13 million, plus or minus, that was due under the terms
14 of the agreement at the closing.

15 Q. Do you know if it was, in fact, or not?

16 A. I couldn't speak to that end, but Bill
17 Najam and Ken Jowdy may have represented that,
18 because Masood Bhatti was very clear at the closing
19 that he would capitalize Ken Jowdy's equity in the
20 Cabo San Lucas closing in order to repay those loans.

21 And I assume with Lehman Brothers, as we
22 thought of them at the time in 2006, they wouldn't
23 just openly offer up \$7 million payout on somebody's
24 words.

25 Q. How much was loaned from Little Isle IV
0499 to Ken Jowdy?

1 A. Some portion of that \$7 million.

2 Q. Was it 7 million?

3 A. There were two entities that ended up
4 loaning money through to Ken Jowdy, Little Isle IV
5 and, Ula Makika, U-L-A, M-A-K-I-K-A. Between the two
6 they represented I believe 100 percent of loan
7 monies.

8 Q. You mentioned Ula Makika, what was that?

9 A. It was just an LLC that was set up after
10 the fact to be a buffer between Ken Jowdy and the
11 Little Isle IV members.

12 Q. Did Ula Makika ever acquire an interest
13 in Little Isle IV?

14 A. It did not.

15 Q. Did Ula Makika ever raise money itself?

16 A. It did not.

17 Q. Where did Ula Makika get monies?

18 A. From Little Isle IV or any of the other
19 Hawaiian entities.

20 Q. And Ula Makika, is that an entity that
21 you are affiliated with?

22 A. It was a single LLC set up in Delaware
23 solely to be a buffer at one point between the Little
24 Isle IV members and Ken Jowdy. There was no other

0500 purpose for it necessarily.

1 BY MR. SMITH:

2 Q. What do you mean to be the buffer?

3 A. In as much as I knew at the time, that
4 the LLCs would protect the members in the event of
5 litigation from being dragged into potential
6 litigation. At the time it was suggested to me by
7 attorneys that I had that I should set up a separate
8 entity, and as much of the money that could go from
9 Little Isle IV or other entities to Ula Makika and
10 then out as the loans would create a buffer between
11 any of those people in any future litigation.

12 It was legal advice.

13 Q. So the members of Little Isle IV would
14 provide money to Ula Makika with the intent of that
15 money being lent to Ken Jowdy?

16 A. And so would others, yes.

17 Q. And Ken Jowdy would, in fact, receive
18 the loans from Ula Makika?

19 A. That's correct, just as he had from
20 Little Isle IV.

21 MR. STOLPER: I think that you
22 testified the last time that Ula Makika is solely
23

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24 owned, 100 percent owned by Little Isle IV; correct?
25 THE WITNESS: All of the funding that

0501

1 went through was owned by -- Ula Makika, I was the
2 managing member, but all of the funding passed
3 through from the different various Hawaii investors,
4 Little Isle IV being one of the groups that I believe
5 funded money into Ula Makika.

6 And, in fact, Ken Jowdy as a result of
7 the loans, actually repaid a significant amount of
8 money back through Ula Makika. So that it was used
9 operationally for the company.

10 BY MR. CASTANO:

11 Q. Ula Makika and Little Isle IV combined,
12 how much did they lend to Ken Jowdy?

13 A. I believe around \$7 million. And
14 approximately \$2 million was paid back by Ken Jowdy
15 to those entities under the terms of the agreement.

16 Q. Did you inform the members of the Little
17 Isle IV that approximately 7 million of approximately
18 12 million, essentially more than half of the monies
19 raised, would be lent to Ken Jowdy?

20 A. As we had discussions ongoing with each
21 of the members, they were all aware that there was
22 significant money being lent to Ken Jowdy.

23 Q. Did you specifically tell them 7
24 million, more than half, 7 million of 12 million?

25 A. If they asked and we were discussing the

0502

1 actual amounts, they were made aware of what the
2 outstanding balance was to the best of my knowledge
3 at that time.

4 Q. Are there any members that would say
5 that you didn't tell them this?

6 A. I don't know.

7 Q. Are you aware of any members that say
8 you didn't tell them?

9 A. Short of Owen Nolan, who we are all
10 aware has been manipulated unfortunately by attorney
11 Michael Meeks and my former employee Christine
12 Myrick, I am not aware of anyone else that would make
13 such statements.

14 Q. So there is only one person you are
15 aware of?

16 A. I am only aware of Owen Nolan.

17 Q. Besides the loan agreement that you
18 talked about before between Little Isle IV and Ken
19 Jowdy, were there any other written documents or
20 e-mails which would memorialize the fact that there
21 was a loan?

22 A. Not that I am aware of.

23 Let me restate that. There are e-mails
24 that were turned over to you guys that were part of a
25 2007 effort to negotiate Ken Jowdy out of the Cabo

0503

1 San Lucas project, where the e-mails back and forth
2 between Ken Jowdy, Bill Najam and Tommy Constantine
3 represents that eight and a half million dollars at
4 that time was the obligation of Ken Jowdy to pay. So
5 the e-mail traffic between Jowdy, Najam and
6 Constantine trying to negotiate a global settlement
7 between all of the issues that were outstanding with
8 Ken Jowdy's theft or refusal to repay was all

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9 memorialized in e-mails. So, yes, there were other
10 documents, Chris. Sorry.

11 Q. Were there any e-mail documents prior to
12 2006?

13 A. Not that I recall.

14 Q. And that document, the loan document
15 that you are talking about, when was that document
16 executed?

17 A. I believe it was in December of 2004.

18 Q. Did the loan document discuss how much
19 money was going to be lent by Little Isle IV to Ken
20 Jowdy?

21 A. It did not. It was represented as a
22 revolving line of credit.

23 Q. Who drafted the loan agreement?

24 A. I did.

25 Q. Did any lawyer review it?

0504
1 A. They did not.

2 Q. Did any of Ken Jowdy's lawyers review it
3 at the time that it was drafted?

4 A. I don't believe so.

5 Q. How did you deliver the document to Mr.
6 Jowdy?

7 A. In person.

8 Q. Was the document notarized?

9 A. It was not. It was signed in Cabo San
10 Lucas.

11 Q. And it was signed by who?

12 A. It was signed by myself, it was signed
13 by Ken Jowdy, and it was witnessed by Robert Gaudet.

14 Q. Did you ever send that document by
15 e-mail to Mr. Jowdy?

16 A. I did not. Mr. Jowdy made a copy of the
17 document after the signing, retained the original,
18 and gave me a copy of it.

19 MR. CASTANO: Do you want to break for
20 lunch right now?

21 MR. STOLPER: It is up to you. You
22 may want to take advantage of the fact that you have
23 George here.

24 MR. CASTANO: That's a good point.

25 Q. Do you know how loans were treated on

0505
1 Little Isle IV's tax documents for each year?

2 A. No, I do not.

3 Q. Did Little Isle IV file tax documents
4 each year?

5 A. Little Isle IV had 2006 tax documents.

6 Q. Did it file tax documents in 2004 and
7 2005?

8 A. I don't believe so.

9 Q. Why didn't it file tax documents in 2004
10 and 2005?

11 A. I was under the understanding from the
12 accountants that since there were no taxable activity
13 in the LLCs that they did not need to file.

14 Q. The interest on the loans wasn't a
15 taxable event?

16 A. No interest had been paid. Only
17 principals repayment were made in '04, '05.

18 Ken Jowdy never got his 5 million
19 principal short of beginning to repay interest and it

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20 is still accruing to this day.

21 BY MR. SMITH:

22 Q. What were the terms?

23 A. To the best of my recollection, 15
24 percent interest due and payable when Ken Jowdy was
25 able to memorialize a loan agreement on either the

0506
1 Diamante del Mar project or the Cabo San Lucas
2 project.

3 Q. So no principal -- principal has accrued
4 up that point but was not payable until that point?

5 A. We were treating it and he was treating
6 it like a revolving line of credit.

7 And, in fact, prior to the December '04
8 signing, approximately \$250,000 had been lent to him
9 and he had repaid approximately \$50,000 of it. And
10 at that point, we decided to memorialize it. And he
11 continued to pay back in small sums from time to
12 time. I am not sure where he got the funds to repay
13 some of those, but he did over time borrow a total of
14 approximately 7 and pay back approximately 2 million,
15 including a flurry of pay backs leading up to the
16 closing in Cabo San Lucas, which gave myself and all
17 of my partners, who were excited about receiving the
18 \$7 million back from Jowdy for the outstanding 5
19 million, we were very excited and very confident at
20 that point that he had made a flurry of payments in I
21 believe January, February and March of 2006 just
22 prior to the Lehman Brothers Cabo San Lucas closing.

23 Q. And your understanding was that the
24 agreement was that any payments that he made would be
25 applied to principal?

0507
1 A. That's correct.

2 Q. And that the interest would continue to
3 accrue on whatever the outstanding balance was?

4 A. Yes, I believe that's correct.

5 Q. And interest wouldn't be payable until
6 the closing of the entities specified?

7 A. That is correct.

8 BY MR. CASTANO:

9 Q. The approximately \$7 million that was
10 lent from Little Isle IV to Jowdy, was that all prior
11 to 2006?

12 A. Yes. The last activity on those loans
13 were a series of repayments, five or six repayments
14 from Jowdy to us leading up to that pending Lehman
15 Brothers closing.

16 MR. CASTANO: Let's mark this as
17 Exhibit 33.

18 (NY-8125 Exhibit Number 33 was
19 so marked for identification.)

20 Q. Mr. Kenner, I am showing what has been
21 marked Diamante Exhibit 33. Please take a moment to
22 review it with your attorney.

23 (Witness complies.)

24 Q. Mr. Kenner, have you seen what has been
25 marked Diamante Exhibit 33 before?

0508
1 A. I believe so.

2 Q. Do you know what it is?

3 A. It appears to be e-mail correspondence
4 between myself and William Najam and Ken Jowdy.

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Q. Do you know what this e-mail concerns?

A. I believe I do.

Q. Can you tell us about it?

A. At the closing of the Cabo San Lucas project, the seller, I believe what the e-mail was referring to were deposits on Ken Jowdy's behalf that were sent directly to the seller of the Cabo San Lucas project.

Bill Najam and Ken Jowdy for the Lehman closing needed to identify the funds that went directly to the seller, Don Atilio Villarino.

Q. Can you spell that?

A. D-O-N, space, A-T-I-L-I-O, space, VILLARINO.

Ken Jowdy, which I found out approximately a year later, represented to the seller and to Lehman Brothers that these were investments in the Cabo San Lucas project, not loans that were made to him in order for him to participate in the project.

In the closing documents, which I didn't

see until early 2007 for the Cabo project, somebody forged my name on two documents for Lehman Brothers representing that these Ula Makika transactions and these Little Isle IV transactions were, in fact, equity investments and they are not loans or otherwise.

Q. Just so that we are clear, Mr. Kenner, you believe that there were \$7 million in loans made to Jowdy from Little Isle IV entities prior to 2006?

A. I believe that the gross number of monies that went to him totalled approximately \$7 million, and the gross number of dollars that came back from Ken Jowdy or other people that he requested to send money back to us under the loan agreement total approximately \$2 million.

Q. Just so we are clear, you are positive that those were not investments, the \$7 million that came from Ken Jowdy?

A. I am crystal clear.

MR. CASTANO: Let's mark this Diamante Exhibit 34.

(NY-8125 Exhibit Number 34 was so marked for identification.)

Q. Mr. Kenner, I am showing you has just been marked as Diamante Exhibit 34. Please take a

moment to review it.

(Witness complies.)

Q. Mr. Kenner, have you seen Diamante exhibit 34 before?

A. Yes.

Q. Do you know what Diamante Exhibit 34 is?

A. It appears to be string of e-mails between myself and Ken Jowdy.

Q. Generally can you tell me about Diamante Exhibit 34 and what these e-mails concern?

A. They concern the basis for Ken Jowdy's disconnect from me and all of our investment partners as soon as he had Lehman Brothers as his funding partner.

Q. When you say "disconnect," what does

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16 that mean?

17 A. Almost immediately following the closing
18 in Cabo San Lucas, when Jowdy and Masood Bhatti made
19 it apparent they were not going to pay back the loan,
20 Ken Jowdy basically started a campaign by spending
21 travel and entertainment money, looking for new
22 projects to fund, ignoring the Cabo San Lucas project
23 as a whole, and had basically refused most
24 communications with me through the fall 2006 when I
25 continued to ask him about repayment of loans,

0511

1 operational status in Cabo San Lucas that my friends
2 and I had invested in, et cetera.

3 Q. Besides the 7 million or approximately
4 \$7 million in loans to Ken Jowdy from Little Isle IV,
5 did you personally loan Ken Jowdy money at that time?

6 A. I don't recall the timing of the money
7 that I lent to Ken Jowdy.

8 Q. Was there a time that you believe you
9 loaned to Ken Jowdy individually?

10 A. Yes.

11 Q. How much did you lend to him?

12 A. I don't remember.

13 Q. More than a million dollar?

14 A. No.

15 Q. More than \$100,000?

16 A. I believe so.

17 Q. Under \$500,000?

18 A. I would guess so.

19 Q. Is there any document memorializing the
20 fact that you lent Ken Jowdy money in an individual
21 capacity?

22 A. At the time I did not memorialize
23 lending my friend money he needed to survive.

24 Q. Approximately when was that personal
25 loan given to Ken Jowdy.

0512

1 A. Funds were ongoing between approximately
2 2003 and 2006, when he received the funding from
3 Lehman Brothers and no longer needed me or my
4 investment friends.

5 Q. You started lending him money in 2003?

6 A. Approximately.

7 Q. I am just curious, it is not
8 confrontational. You referred to him as a friend. I
9 think your testimony was you met him 2003 and you
10 started lending him money in 2003; is that right?

11 A. I believe I met him 2001 or 2002, but I
12 don't recall specifically as I sit here, but
13 approximately 2003 was about when he would ask to
14 borrow funds from time to time.

15 Q. I want to direct your attention to the
16 third page of the Diamante Exhibit 34, about four
17 paragraphs down it begins with -- the paragraph on
18 the last page.

19 You can review it, that's fine.

20 A. Yes.

21 Q. The paragraph begins, remember that I
22 raised 9.25 M, I guess that's million, for Diamante
23 del Mar, 7 million for what appears to be Diamante
24 Cabo San Lucas, 1 million for Cabo San Lucas Airport,
25 1 million for Diamante Air, 750 for the Vegas home --

0513

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1 and so that the record is clear, I am paraphrasing
2 some things that have been shortened here, not
3 reading verbatim -- another 2.5 million out in loans
4 to all those entities, plus others like Star Time.

5 Do you know what that is referring to?

6 A. At the time I believe I was trying to
7 jog Ken Jowdy's memory that myself and my friends
8 were heavy investors in everything that he was trying
9 to do, and he seemed to, frankly, for the six months
10 following the Cabo San Lucas closing had completely
11 forgotten and neglected all of us.

12 Q. You mentioned here nearly 2.5 million
13 out in loans. Is that just a mistake by you? Was
14 the number closer to 7?

15 A. The number, Chris, to be very clear, the
16 number never got to 7 million. The number probably
17 peaked out approximately where it did at \$5 million
18 at the closing. And the 7 million I referred to that
19 they were going to pay us back included that ongoing
20 revolving 15 percent interest.

21 Q. Before I thought your testimony was
22 clear. You are saying something different. The
23 record is what it is.

24 \$7 million of the \$12 million, all
25 approximately, wasn't loaned from Little Isle IV to

0514 1 Jowdy. What your testimony now is it was closer to
2 \$5 million but that you would be getting back
3 approximately \$7 million because of interest or is it
4 something else?

5 A. I will restate it to be clear, although
6 the testimony speaks for itself, we may be just
7 mincing words.

8 Over the period of the loan to Ken
9 Jowdy, funds were requested by him, if I believed
10 that they were in the interest of the Mexican
11 projects, as was the basis for the loans, we would
12 lend money to Ken Jowdy. From time to time while the
13 outstanding line of credit was open, Ken Jowdy would
14 repay funds to us. It wasn't until the spring of
15 2006 that he had asked me to do a final accounting
16 for how much interest and principal was still due.

17 The principal was approximately \$5
18 million at the time in the spring of '06. The
19 interest was approximately \$2 million. A year later
20 I believe the total principal and interest was
21 approximately eight and a half million, which was
22 also memorialized in the e-mail traffic between
23 Najam, Jowdy and Constantine, as the interest
24 continued to accrue.

25 Q. So that the record is clear, how much

0515 1 did Little Isle IV lend to Jowdy approximately?

2 A. The gross dollars that went out over
3 time I believe were about 7 million and over that
4 same period of time he repaid approximately 2 million
5 of it. So it wasn't 7 million out and then 2 million
6 back.

7 Q. I understand.

8 A. Again, just to be very clear, because I
9 want to make sure it is clear on the record, the
10 monies would go out and he would pay some of it back
11 over that period of time.

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Q. The question was simple: Approximately how much money did Little Isle IV lend Ken Jowdy?

MR. STOLPER: It is already asked and answered seven times.

MR. CASTANO: Again, I don't understand --

MR. STOLPER: The other two do.

MR. CASTANO: And I am clearly not the sharpest knife in the room, so let's hear it for the dummy.

Q. Go ahead.

A. I will try to say it again because as I am describing it --

Q. Mr. Kenner, let's just be clear. I am

asking one question at a time. I am not asking how much he paid back. We will get there.

The question is: Approximately how much money did Little Isle IV lend Ken Jowdy approximately in total? Not how much did he pay it back.

A. \$7 million approximately went out over time to Ken Jowdy as loans.

Q. Approximately how much was paid back?

A. Approximately \$2 million over that period of time.

Q. And that time period included up until to the closing by Lehman Brothers?

A. Summer 2004 through spring 2006, which was the Lehman Brothers funding of the Cabo San Lucas project.

Q. Looking at Diamante Exhibit 34 it says here, "and have nearly 2.5 million out in loans."

Should that number have been closer to \$5 million?

A. I think that number represents 2.5 million out perhaps to some of those entities and then I say, "Plus others like Star Time," meaning, as I am typing on a small two-way pager at the time, there are other monies that are also due back that weren't directly sent to those entities.

Q. What is Star Time?

A. Star time is some other entity that Ken Jowdy and his brother owned that borrowed funds.

Q. So the monies went to, that were lent from Little Isle IV, went from Little Isle IV to Ken Jowdy himself and an entity called Star Time?

A. The money would be requested by Jowdy, there would be a story behind each financial request, and then we would wire money to wherever Ken Jowdy asked those funds go.

The Star Time deal in particular, Jowdy had said during that period of time that he and his brother were selling their business for a couple of million dollars and they needed legal fees to conclude the deal, and as soon as the deal was done, Ken Jowdy was going to receive a million-five from the sale of that project that he and brother worked on in Atlanta, and as soon as they did, he would be repaying the full million-five to the loans.

Q. Looking at that same paragraph, it indicates you raised 9.25 million for Diamante del Mar; do you know what that is referring to?

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23 A. I don't want any words here to be
24 misrepresented, but it should be really clear that I
25 was trying to jog Ken Jowdy's memory that each of the

0518 1 things he wanted to do, whether it was the 9 million
2 for Diamante del Mar or the 7 million of equity that
3 was represented to Lehman Brothers at Cabo San Lucas,
4 et cetera, et cetera, all came after he met me. And
5 that now, since he got what he wanted, which was his
6 relationship with Lehman Brothers, which he also met
7 through an associate of mine, he now forgot about
8 everything else that was done for him at that point
9 in time and was acting like a big shot who didn't
10 need us.

11 Q. I appreciate that explanation --

12 A. Chris, so it is also very clear, I wrote
13 this e-mail off the top of my head as I was writing
14 it.

15 Q. That's fine.

16 The question was: "I raised 9.25
17 million for Diamante del Mar," what was that
18 referring to?

19 A. It refers to what I believe was the nine
20 and a quarter million that he ended with, what I
21 believe is nine and a quarter million, or did at the
22 time.

23 Q. And that's basically monies you brought
24 to the table?

25 A. What I am again trying to get Ken Jowdy

0519 1 to recognize in the fall of 2006 is that he had a lot
2 of dreams for development and other ventures prior to
3 meeting me, and after he met me, all of these things
4 occurred because he now was into a circle of people
5 that wanted to also invest in projects and believe in
6 this stuff.

7 I was just merely trying to get his
8 attention.

9 MR. CASTANO: Why don't we go for lunch
10 now. We will go off the record at 12:20 p.m.
11 (Lunch recess taken.)

12 MR. CASTANO: We are back on the record
13 at 1:18 p.m. Tuesday, August 16.

14 Q. Mr. Kenner, while we were off the
15 record, were there any substantive conversations
16 between the Commission staff and yourself?

17 A. No.

18 MR. STOLPER: He would like to clarify
19 something.

20 BY MR. SMITH:

21 Q. Sure, go ahead.

22 A. If you don't mind, thank you, Justin.
23 On Exhibit 34 when you were asking about
24 the totals and the loans, again, I stated earlier
25 that I had written this pretty quickly on a two-way

0520 1 Blackberry in response to Ken Jowdy's long response.

2 MR. STOLPER: Blackberry or a pager?

3 A. Two-way pager.

4 When you were asking about the two and a
5 half million dollars in loans, I can suggest another
6 two and a half million dollars of the loans is
7 wrapped up in the \$7 million for DCSL, so two and a

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8 half of the five million were part of the loans given
9 to Ken Jowdy. He represents it as his capital
10 account inside the Cabo San Lucas project as a two
11 and a half million dollar contribution. So, in
12 essence, again, typing fast, I wrote two and a half
13 million dollar loan that went to Jowdy for his
14 capital accounts inside that \$7 million was
15 misrepresented on the operating agreement and then
16 another two and a half million.

17 And, again, I wrote it very quickly
18 trying to make the point that we have been around
19 here for a bunch of years, my friends and I. Don't
20 forget about us six months after you finally got the
21 golden goose with Lehman Brothers and they are
22 letting you just run free without us.

23 Q. That's helpful, I actually want to
24 follow up a little bit on that. That is exactly the
25 line of questions I wanted to ask you.

0521
1 But just initially, this was an exchange
2 that was initiated by you, this message that we are
3 referring to, it starts on the second page and
4 continues on the third page of the document. That
5 was the first message, the one that says "Subject:
6 Open Issues"?

7 A. I believe so.

8 Q. So you were initiating this by pager?

9 A. Yes.

10 Q. And referring right to the sentence that
11 you were just referring to in your clarification, it
12 seems like the first part that sentence: Remember I
13 raised 9.25 for Diamante del Mar, 7 million for Cabo
14 San Lucas, 1 million for the Airport, 1 million for
15 D-Air, 750,000 for the Vegas home, on the one hand.
16 And you also write: And I have nearly 2.5 million
17 out in loans to all those entities, plus others like
18 Star Time.

19 It sounds like in the first part of that
20 message you are referring to money out that is not
21 loans, and then the 2.5 million is loans, but it
22 sounds like from your clarification, you are
23 explaining that part of that money in the first part
24 of the sentence was actually loan money?

25 A. Again, if we can go back to 2006 when

0522
1 there was the beginning of the acrimony with Ken
2 Jowdy, in my best effort, I was trying to document or
3 articulate to him in hyperbole and otherwise, funds
4 that he had benefitted from that come from my friends
5 and I. In that some context, please note that the
6 750 that is represented as for the Vegas home, that
7 was Ken Jowdy's home that he was ultimately sued by
8 Glen Murray in Nevada for, and Ken Jowdy found guilty
9 of borrowing the money and not repaying the loan, and
10 there is now a million dollar plus judgment against
11 Ken Jowdy for that loan.

12 So, again, here, according to your
13 question, that may sound as if it was represented
14 that I raised 750 for that home. That is not in fact
15 the case. That was a loan also from someone else Ken
16 Jowdy borrowed money from, he tried to fight it
17 defensively in the Nevada State Court. He lost.
18 There is a million dollar plus judgment against Ken

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19 Jowdy for those funds that Ken Jowdy borrowed from
20 Glen Murray for that.

21 Q. Just reading structurally, it looks like
22 first part was non-loans and then the 2.5 million was
23 loans.

24 So if you could just if you look at each
25 of numbers individually, and let me know what portion

0523 1 of them is loan or non-loan or if it is all loans.
2 You've got 9.25 million raised by you for Diamante
3 del Mar. What was that 9.25 million?

4 A. If I could be real clear on the language
5 that was used at the time, the statement that I
6 raised the funds, it misrepresents that Ken Jowdy was
7 introduced to all of my clients in some large part
8 because of me. Now, obviously, we talked about
9 several of my clients that he knew prior to knowing
10 me, but I am just trying to, in a representative way,
11 suggest to him this has all been a benefit to him,
12 and he has now been the benefactor of all of this
13 subsequent to meeting me at some particular time, and
14 to stop avoiding me and my friends because it is not
15 right ethically or morally.

16 To address your question, of the 9.25
17 million, just based on the del Mar offerings, about
18 half of that is equity, half of it is loans. Of the
19 Cabo San Lucas 7 million, four and a half million are
20 investments from my friends and I, two and a half
21 million is part of the loan that Jowdy represents as
22 his capital account. The CSL Airport, million
23 dollars, those are equity investments in the airport
24 down in Cabo San Lucas, which is going to be subject
25 to some more litigation for fraud down in Mexico.

0524 1 Q. That was also by you and your clients?

2 A. Me and my friends, that's correct.

3 Q. When you say your friends, the same
4 individuals that we were talking about earlier that
5 we described as your clients?

6 A. Some, yes.

7 Q. And some?

8 A. Some potentially no. I don't remember
9 the timing of these issues as I sit here today.

10 Diamante Air, plus or minus a million
11 dollars were from clients, friends and myself.

12 Q. And that was a loan or equity?

13 A. They were equity, but Ken Jowdy
14 converted the airplanes and he and friends ran it
15 into the ground and left several of us in debt on the
16 planes and walked away.

17 The Vegas home was a loan that he
18 misrepresented and misallocated and Glen Murray took
19 him to trial in Nevada, which I forwarded all those
20 judgments and transcripts to you guys, so those were
21 loans.

22 Two and a half million were loans, the
23 remaining two and a half million that complements the
24 two and a half million loan as capital account in
25 Cabo San Lucas.

0525 1 Q. The two and a half million in this
2 sentence refers to loans to all of these entities,
3 meaning DDM, DCSL, CSL, D-Air, and the Vegas home?

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A. Right.

Q. So there was 2.5 million in loans total?

A. Let me just suggest in context of the thousands of e-mails Ken Jowdy and I exchanged over our relationship, I can't imagine there is more than two dozen of them that are longer than a paragraph. This is a very frustrating point for my friends and I to ask why Ken Jowdy is no longer communicating with us --

Q. I think I understand the context.

A. So the fact that there is a long e-mail that I typed on a two-way pager, this is already well beyond the scope of what I would normally send him, so as I am writing this out of frustration and trying to represent the best I can what is going on and why he is behaving the way he is, I am really just trying to get his attention and say, hey, whatever it takes, just pay attention to us, this is just wrong what you are doing.

Q. I understand your context, but within that context I want to understand some of the details here.

A. Okay. And, again, I will tell you it is five years ago, I am trying to remember the context of it five years ago, but as I thought about it at lunch, the other two and a half million dollars plus or minus that is still out as loans to Jowdy that are represented on many other documents, whether it be the original loan agreement that substantiates it, the bank statements that qualify every dollar that went to Ken Jowdy or his controlled entities.

The one e-mail that I do recall, which is the Jowdy, Masood Bhatti, Bill Najam and Tommy Constantine e-mail, tried to settle things about a year after this --

Q. I appreciate that there are other documents.

MR. STOLPER: The question pending is: Did you make -- you have 2.5 million out in loans to all those entities plus others like Star Time. So the question he asked was: Is the two and a half million dollar loans to all the entities referenced in the sentence plus others not specified like Star Time. His question is: Who are those loans to.

MR. SMITH: That's correct.

A. Thank you both.

The underlying loans are all to Ken

Jowdy personally, so where the funds went, all I am trying to represent is, to the best I can recall, is that money went to a lot of sources, a lot of destinations that Ken Jowdy request they go to, like Star Time and others.

I think my goal was to say in this e-mail, look there is a ton of money out there, pay attention to us. And I don't think the specifics of the actual dollars, although I may be very close and accurate on how much is in total --

Q. That's fine. I understand we are years later, but to the best of your recollection as you sit here today, you refer here to \$2.5 million loans to all of those entities.

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15 what I am curious about is what is the
16 breakdown by dollar amount to each of those entities
17 within this \$2.5 million total?

18 A. First, as I sit here today, I don't
19 recall, but I can suggest that it is memorialized in
20 the bank statements, and it is also memorialized in
21 the complaint in Arizona that we sued Ken Jowdy for
22 the outstanding balance of 5 million plus interest.

23 MR. STOLPER: Clarify for Justin, are
24 there any loans to any of these entities. That's
25 what he is asking.

0528
1 A. Yes.

2 MR. STOLPER: I thought the loans were
3 to Jowdy.

4 THE WITNESS: Excellent clarification.
5 Thank you.

6 A. The loans are to Ken Jowdy. Funds were
7 not sent to a Ken Jowdy personal bank account. They
8 were sent wherever.

9 Thank you for the clarity. I hope it is
10 clear.

11 MR. STOLPER: So your e-mail is wrong.

12 A. My e-mail is wrong that says particular
13 entities. It all went to Ken Jowdy.

14 Q. I thought you said funds went to
15 entities but you had an oral understanding with Jowdy
16 that they were loans to Jowdy personally?

17 A. Written agreement to Ken Jowdy.

18 Q. You had a written agreement that there
19 was a \$2.5 million --

20 A. No. The revolving line of credit we
21 talked about from December '04.

22 Q. So this \$2.5 million refers to that
23 revolving line of credit?

24 A. That is correct. And so does two and a
25 half of the 7 in the DCSL

0529
1 MR. STOLPER: You may want to explain
2 why that makes sense. Why would a \$2.5 million
3 revolving line of credit be treated as capital? What
4 was his purpose for needing that money?

5 I think you testified last time about
6 it, but it is important for Justin to know that.

7 A. When the closing in the spring of '06
8 was getting near its finality, Jowdy and Najam told
9 me that Lehman Brothers needed to represent that Ken
10 Jowdy had as much money in the project as the new
11 managing member, as myself or any of the other
12 entities. So since Jozef Stumbel, Jere Lehtinen and
13 myself had two and a half million dollars in our
14 entity, and that was the largest contribution
15 account, Lehman Brothers told Jowdy that he had to
16 get my permission to list two and a half million on
17 his capital contribution.

18 Q. Is that the reason why you have 2.5
19 million listed here separately as loans and then 2.5
20 aggregated into the 7 million that was raised for
21 DCSL?

22 A. As I sit here today, I can guess that
23 would be accurate.

24 Q. I don't want you to guess. If you have
25 a recollection.

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1 A. My recollection is I tried to represent
2 the total gross dollars as best I could in a single
3 e-mail.

4 Q. Going back to the 7 million here for
5 DCSL, you said 4.5 million of that was equity and 2.5
6 million was this revolving loan that was provided, as
7 I understood testimony from earlier this morning,
8 from Ula Makika as well as Little Isle IV?

9 A. That is correct.

10 Q. And the 4.5 million equity, who provided
11 that?

12 A. That came from approximately 12 of my
13 friends and clients and myself.

14 Q. How much did you provide of that?

15 A. I think we talked about approximately
16 \$100,000 at the time.

17 Q. And the other individuals, were those
18 the same people that, the same clients of yours that
19 had invested in Little Isle IV?

20 A. I would say for the most part there is a
21 heavy crossover between all of the Hawaii members,
22 the Cabo San Lucas members and the Diamante del Mar
23 members.

24 Q. Were those funds that were provided,
25 referring again specifically not to the loan, but the

0531

1 4.5 million equity, were those funds provided
2 directly by those individuals to Diamante Cabo San
3 Lucas or were they provided sort of through Little
4 Isle IV or some other entity?

5 A. They were all individually sent directly
6 to Ken Jowdy for the Cabo San Lucas, not through
7 Little Isle IV or any other way related.

8 Q. Or Ula Makika?

9 A. No Hawaii-related entities at all.
10 Little Isle IV, Ula Makika or otherwise.

11 BY MR. CASTANO:

12 Q. I want to talk to you about when the 12
13 clients for Diamante Cabo San Lucas, where the 4.5
14 million came from, you said \$100,000 came from you
15 and the rest from your clients.

16 How did that actually physically happen?
17 Did it come from lines of credit or did it come from
18 them wiring money?

19 A. I believe none of them came from lines
20 of credit. Certainly none of them came from lines of
21 credit related to lines of credit we talked about
22 before relating to Hawaii.

23 The best I recall today is that 100
24 percent of those funds were wired from their personal
25 individual accounts directly to the entities that Ken

0532

1 Jowdy or his attorney, Fernando Garcia, told me they
2 needed the funds.

3 Q. Were they wired by the individuals
4 themselves or did you make the wires happen yourself
5 without them physically contacting the bank and doing
6 it?

7 A. I am sure I assisted in the actual
8 physical transaction for about half of them and I
9 would assume the other half handled the transactions
10 directly themselves.

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11 Q. When you say "assisted," what does that
12 mean?

13 A. I had power of attorney over their
14 operating accounts to pay bills and otherwise.

15 Q. Before you made this transfer, did you
16 contact them and let them know that this was going to
17 happen or did you just do it because you had power of
18 attorney?

19 A. I never made any transactions solely as
20 power of attorney prior to discussing any
21 transactions with any of my clients at any point in
22 time.

23 Q. We talked this morning and I want to get
24 back into it briefly, about what you might have said
25 to Little Isle IV members prior to them becoming

0533 1 members. And I just want to make sure the record is
2 clear that you, in fact, had conversations and that
3 you remember having conversations with them before
4 they became members about Little Isle IV, rather than
5 it would have been your general business practice to
6 have conversations.

7 So the question is: Do you
8 specifically recall, prior to your clients becoming
9 members of Little Isle IV, having conversations with
10 them about their membership in Little Isle IV?

11 A. Yes, and specifically on every occasion.

12 Q. That would be for each one of your
13 clients, so if I were go to down the list, for
14 example, Mr. Bernard, Sergei Gonchar, Joe Juneau,
15 Glen Murray, you recall specifically having
16 conversations with them.

17 A. With each and every one.

18 Q. I want to talk to you now about Rodney
19 Dalton. Who is Rodney Dalton?

20 A. He was a hard money lender that got
21 introduced to Ken Jowdy and I.

22 Q. Did there ever come a time that Little
23 Isle IV assets were transferred to him?

24 A. Yes.

25 Q. Can you tell me about that?

0534 1 A. Rodney Dalton had a potential hard money
2 -- strike that.

3 Rodney Dalton represented that he could
4 provide hard money lending through a series of
5 European connections based on collateral that he
6 owned. He represented very clearly that the funding
7 from this European hard money could not be used for
8 any project in the United States; thus, ruling out
9 any ability for my partners and I to utilize any of
10 that funding in Hawaii.

11 Ken Jowdy had a series of face-to-face
12 meetings with him, of which I attended two very brief
13 ones, I believe. And at Ken Jowdy's request, he
14 believed he had a deal struck with Rodney Dalton to
15 fund all of the money Jowdy would need both for the
16 Diamante del Mar and the Diamante Cabo San Lucas
17 project. So Jowdy has asked me, as part of his
18 revolving line of credit, to forward funds to Rodney
19 Dalton, again, secured by Ken Jowdy's interests in
20 the Diamante del Mar project and the future Cabo
21 project to assist him in securing the unlimited

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22 funding he needed.

23 Q. What documents did you see from Rodney
24 Dalton to establish that he had collateral in various
25 assets, if any?

0535 1 A. I don't think I saw anything.

2 Q. Did you see any documents from Rodney
3 Dalton?

4 A. I don't believe I saw any documents from
5 Rodney Dalton.

6 Q. How much money approximately went from
7 Little Isle IV to Rodney Dalton?

8 A. I think about 900,000.

9 Q. Was Rodney Dalton a hard money lender or
10 was he -- did he have anything to do with rubies or
11 jewels of any sort?

12 A. To the best of my understanding from the
13 two brief meetings I had with him when Ken Jowdy
14 asked me to come along, he talked about a ruby that
15 he had that would be used for collateral for some
16 lending opportunity.

17 Again, there was deal that Ken Jowdy
18 struck with Rodney Dalton, so I wasn't a party to the
19 lending agreement or any discussions they had about
20 how they were going to ultimately do it.

21 BY MR. SMITH:

22 Q. What was your understanding of the deal?

23 A. As simple as an outsider, Ken Jowdy
24 would run a lot ideas by me, but much like dozens of
25 hard money lenders, he believed that this guy was the

0536 1 real deal and he told me that as a result of this
2 ruby that he had to put up as collateral, that Jowdy
3 had dealt with one of his relatives, one of Ken
4 Jowdy's own relatives, to confirm the validity of the
5 ruby and its existence, et cetera, and that Ken Jowdy
6 felt very secure that he was going to get funding in
7 Mexico for both projects and he was very excited
8 about it, and during his zealousness, asked for me to
9 forward the money under the terms of his revolving
10 line of credit to Rodney Dalton on maybe two separate
11 occasions, and that the funding was imminent.

12 Q. I am still a little confused, though,
13 about how the deal was actually to be structured. I
14 understand you said it was between Ken Jowdy and
15 Rodney Dalton, but what was your understanding of
16 exactly how it worked.

17 Dalton owned a ruby?

18 A. Again, I am a third party, so I know
19 only limited amounts.

20 Q. I understand?

21 A. My understanding was that Dalton owned a
22 ruby, he and his partner, Jim Sheppard, who I believe
23 was American, I believe Dalton was a British citizen,
24 had this ruby that they could collateralize and based
25 on collateral could create an ongoing funding source

0537 1 and the funding had to be used outside of the United
2 States for project funding. That's pretty much the
3 extent of what I knew.

4 Q. Did you understand what they were to
5 receive in exchange for -- and this funding would be
6 provided to Ken Jowdy?

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A. Yes.

Q. And what were they to receive in exchange?

A. I believe interest payments.

Q. Do you know how much?

A. I do not. Ken Jowdy had his own series of attorneys and relatives who were attorneys and business people who he would count on for this.

Q. Do you know why the funds couldn't be used for projects in the United States?

A. That's what I was told by Ken Jowdy.

Q. But you don't know why?

A. I don't know why.

BY MR. CASTANO:

Q. And the agreement was between Mr. Jowdy and Mr. Dalton?

A. That's correct.

Q. You just provided the funding?

A. That's correct.

BY MR. SMITH:

Q. What was the reason Ken Jowdy requested the funding from Little Isle IV?

A. It was part of his revolving line of credit agreement with us. My understanding, and through my experience with a lot of consultants and hard money guys, they require funds up front as a fee to be paid to secure the loans that were coming.

Q. Do you know what the amount of the loans that were supposed to be coming from Rodney Dalton?

A. I do not.

Q. Do you have any idea of the magnitude?

A. I think hundreds of millions of dollars.

MR. STOLPER: Hundreds of millions?

THE WITNESS: Yes.

Q. Secured by a ruby?

A. Secured by a very large ruby.

Q. Was there any other source of collateral on those loans to your understanding?

A. Not that I understand.

Q. Jowdy asked you, Little Isle IV, to provide I think you said the total was \$900,000 to him as part of his revolving line of credit.

Do I have that right?

A. That's correct.

Q. And your understanding the \$900,000 was to be used to provide funds to Dalton in anticipation of much larger loans in the magnitude of hundreds of millions of dollars to be provide back to Jowdy?

A. Yes. Jowdy was very excited about being able to fulfill the first \$50 million of build out at Diamante del Mar as a result and the subsequent acquisition in Cabo San Lucas that he knew would be in the 75 to \$100 million range.

Q. And you never saw any documents reflecting any likelihood that Dalton would be able to provide those funds?

A. Not that I am aware of.

Q. Did he provide in discussions that you had with them any representations on how he would go about obtaining these funds?

A. Not that I recall.

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Q. Did Jowdy ever tell you that he had conversations about obtaining those funds?

A. Could you ask the question again?

Q. Did Jowdy ever tell you his understanding about how Dalton would be able to provide those funds?

A. As simple as I can recall, this large ruby that was in Dalton's possession that Jowdy told

me his relatives had checked out, would be set up as collateral, and then the monies that Dalton would receive back for the collateral would ultimately be used for some financing deal in Europe, and those financing funds could not come to the United States, which is why Ken Jowdy wanted to borrow the money to use it to help his projects in Mexico.

BY MR. CASTANO:

Q. Besides the two meetings with Mr. Dalton that you attended, did you have any other meetings with him?

A. Not that I recall.

Q. Did you have any telephone conversations with him?

A. I don't think so. I think all phone calls were Ken Jowdy phone calls. But there was a lot of activity going on, but I don't believe I ever tried to call or spoke with Rodney myself.

Q. Did you communicate in any other way with Mr. Dalton, e-mail or otherwise?

A. I don't think so. There was a third party who introduced us to Rodney Dalton that I would communicate with from time to time to ask about status. He would always tell me he was communicating with Rodney Dalton.

Q. Did you send money directly to Mr. Dalton or did you send money to Ken Jowdy?

A. I believe to an account entitled Jim Sheppard for Rodney Dalton.

Q. That was on Ken Jowdy's instruction?

A. Yes, it was.

Q. Who was the third party?

A. Todd Burkhardt, B-U-R-K-H-A-R-D-T.

Q. Someone who you knew or someone Ken Jowdy knew?

A. I met him through some affiliation in the hockey world.

BY MR. SMITH:

Q. So he was known to you before being known to Jowdy?

A. I don't recall. There was a lot of hard money lenders that were introduced to us from a number of different sources.

BY MR. CASTANO:

Q. Prior to money being sent to Mr. Dalton -- let's back up.

Was money sent from Little Isle IV to Mr. Dalton?

A. I don't recall if it is Ula Makika or Little Isle IV.

Q. Did it come from one of the Hawaiian entities?

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3 A. Yes, it did.

4 Q. Prior to money being sent from Hawaiian
5 entities to Mr. Dalton, did you contact your members
6 of Little Isle IV and let them know monies were going
7 to be shipped from the Hawaiian entities to Mr.
8 Dalton?

9 A. I don't think so because the loans were
10 being made, again, to Ken Jowdy, which they were all
11 aware of the loans.

12 Q. This is part of the original loan
13 agreement, the one-page loan agreement?

14 A. That's correct.

15 Q. Let me ask you this: It is a one-page
16 loan agreement, it is millions of dollars. Did you
17 ever have concern that you were lending millions of
18 dollars to Mr. Jowdy and you simply had a one-page
19 loan agreement between him and yourself that wasn't
20 vetted or looked over by any attorneys?

21 A. At the time there were several factors.
22 First, the revolving line of credit with Ken Jowdy I
23 don't think in 2004 ever had any intention to grow as
24 large as it did in our first initial memorialization
25 of it.

0543 1 The loan agreement should have only been
2 outstanding for about 16 months, from December '04 to
3 the spring of '06. During that period of time, as
4 Lehman Brothers got involved with the project and we
5 continued to be assured by Masood Bhatti that the
6 deal was getting done and that they would repay the
7 loans, and we were dealing with partner like Ken
8 Jowdy at the time who we all considered our friend.

9 Ken Jowdy was the controlling member of
10 the Diamante del Mar project. I believe he owned
11 over 70 percent of that project and we had recently
12 received a KPMG appraisal for \$69 million for that
13 piece of land. At the time in '04, '05, and early
14 '06, that land was owned for cash. So as far as
15 feeling secure or not having any concerns, we had a
16 very wealthy partner who owned a significant 50
17 something million dollars worth of land on one
18 project, we had Lehman Brothers and Masood Bhatti
19 assuring us they were going to close the financing.
20 I said met be Lehman Brothers through a very credible
21 individual in New York, so I had no concerns for
22 that. And at the time, everything seemed to line up
23 without any issue for us to have to raise any flags.

24 In fact, up to closing in spring of '06,
25 there were no concerns as Ken Jowdy did wire back

0544 1 five or six transactions totalling about a quarter
2 million dollars to show that good faith was occurring
3 and we were ready to close the deal.

4 MR. CASTANO: Can you read back my
5 question.

6 (Record read.)

7 A. No.

8 Q. The fee simple we talked about last
9 time, did you see any documents confirming that
10 Diamante del Mar and Diamante Cabo San Lucas were, in
11 fact, owned fee simple by Jowdy or the Jowdy
12 entities?

13 A. As I sit here today, I don't recall if
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14 I've ever seen one of those documents specifically
15 outlining the fee simple 100 percent ownership status
16 of the Diamante del Mar or del Mar related entities,
17 although all those documents would have been
18 presented in Spanish if that was the case. I don't
19 speak Spanish.

20 Q. Were you ever given the opportunity to
21 review those Spanish documents?

22 A. I believe I had received at one point in
23 time the documents in Spanish when one of the U.S.
24 title insurance companies had to review them to
25 insure the insurability of that property as a fee

0545 1 simple equivalent piece of land.

2 With respect to Diamante Cabo San Lucas,
3 much the same. Prior to our understanding and my
4 understanding that Lehman Brothers could lend on that
5 property, it had to pass all the U.S. title insurance
6 issues to be a clear piece of land and fall under the
7 normal guidelines for being the equivalent of fee
8 simple.

9 Q. Sitting here today, did you have an
10 opportunity to review the Diamante del Mar fee simple
11 documents prior to any of your clients becoming
12 members or investors in Diamante del Mar?

13 A. I don't recall.

14 Q. Do you know, sitting here today, whether
15 Diamante del Mar, in fact, or the entity itself or
16 Mr. Jowdy, had ever, in fact, acquired Mexican fee
17 simple?

18 A. I believe, based on a loan that was made
19 to Ken Jowdy in the fall of 2006 by KSI International
20 in New Jersey, that they went through U.S. titling
21 and U.S. insurability issues, where it be Fidelity
22 National Title or someone similar. So I believe that
23 may have been the first time that I ever had full
24 confidence that the land had gone through full fee
25 simple titling. But I had no reason to doubt it at

0546 1 any time prior, certainly because I was given
2 assurance by the Mexican attorney, Fernando Garcia.

3 Q. Mr. Garcia gave you assurances?

4 A. Yes. Mr. Garcia also confirmed, when I
5 first met them in Mexico on my very first trip, that
6 Ken Jowdy had already owned the land.

7 Q. Again, he confirmed orally?

8 A. Yes.

9 Q. Did he confirm it in writing?

10 A. I didn't correspond in writing with Mr.
11 Garcia at the time.

12 Q. Did you ask Mr. Garcia to give you
13 documents establishing that fee simple had been
14 acquired?

15 A. I don't recall what was given to us as
16 part of those early subscription agreements or
17 offering memorandums with Diamante del Mar, but I did
18 turn it all over to you, what I originally received
19 in '02, '03.

20 Q. Let's turn back to the Dalton
21 discussions.

22 MR. CASTANO: We will mark as Diamante
23 Exhibit 35 a collection of various documents. I
24 don't believe it is one particular document. For

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25 speed, it has been put together.

0547

1 (NY-8125 Exhibit Number 35 was
2 so marked for identification.)

3 Q. I am showing you, Mr. Kenner, what has
4 been marked Diamante Exhibit 35.

5 Please take a moment to review that.

6 (Witness complies.)

7 MR. STOLPER: Do you know whose
8 redactions they are?

9 MR. CASTANO: I can't answer that
10 question.

11 MR. STOLPER: Chris, I am just noting
12 there are redactions --

13 MR. CASTANO: You can make your notice
14 on the record.

15 MR. STOLPER: I just want to know are
16 those SEC redactions.

17 MR. CASTANO: I can't answer any of
18 your questions. The document is in front of him.
19 You can make objections if you want.

20 MR. STOLPER: You guys are not allowed
21 to say if you redacted them or not?

22 MR. CASTANO: I am not answering the
23 question.

24 MR. STOLPER: If you are not answering
25 because you are not allowed, because usually in a

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1 civil case when you have redactions because somebody
2 is establishing privilege, they say, they take
3 responsibility for that. So if the witness is being
4 presented with a document --

5 MR. CASTANO: I am not taking
6 responsibility for anything. This is the document I
7 am putting before your client. You can make whatever
8 objections you want.

9 MR. STOLPER: I am just asking for a
10 courtesy response to my question.

11 MR. CASTANO: I am not going to give
12 you an answer where this document came from, who
13 redacted it. I can't. I am not.

14 Q. Mr. Kenner, have you seen Diamante
15 Exhibit 35 before?

16 A. I think I have seen at least most of
17 that.

18 Q. I know that different pages, the first
19 question is, the first document on the top, do you
20 know who redacted this document, if anyone?

21 A. I believe Ken Jowdy or one of his
22 attorneys redacted it.

23 Q. Looking at the first page of Diamante
24 Exhibit 35, it's an e-mail. It appears there might
25 have been two documents that may have been attached

0549

1 to this e-mail.

2 Do you know if next two pages of the
3 document are those two documents that were attached,
4 that would be pages 2 and 3 of Diamante Exhibit 35?

5 A. I don't know if they are or not but I
6 have seen those documents.

7 Q. Do you know who Todd Burkhardt is?

8 A. That's the gentleman we talked about
9 before. That's the gentleman I would speak with from

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10 time to time because he was working on other
11 financing for me in Hawaii.

12 BY MR. SMITH:

13 Q. This is the person who introduced you
14 and/or Jowdy to Dalton?

15 A. And some guy named Jim Sheppard. I
16 never met Jim Sheppard, but I am sure Jowdy had met
17 with them.

18 Q. Mr. Kenner, I want to direct your
19 attention to second and third page of Diamante
20 Exhibit 35 when your attorney is done looking at it?

21 MR. STOLPER: You can ask questions.

22 Q. Have you seen the second and third page
23 of Diamante Exhibit 35 before?

24 A. I believe I have seen these before.

25 Q. The agreement on the third page, have

0550

1 you seen that before?

2 A. I believe I have.

3 Q. I think the testimony earlier was that
4 you don't recall or you believe there was no
5 agreement between Mr. Dalton and yourself.

6 Is that right or do you believe there
7 was, in fact, an agreement between yourself and Mr.
8 Dalton looking at this document?

9 A. I recognize this document as perhaps
10 being one that was sent but I don't recall ever
11 signing a document like this.

12 Q. Do you know why you would receive this
13 document?

14 A. I believe the e-mail came from, if these
15 two pages are, in fact, the attachment that did come
16 with the original e-mail, I believe they would have
17 come from Todd Burkhardt, so it would have been
18 normal for Burkhardt to send something to me to give
19 to Jowdy.

20 Q. Do you know why it would be an agreement
21 between yourself and Mr. Jowdy and Mr. Dalton, or was
22 it an agreement just between Mr. Dalton and Mr.
23 Jowdy?

24 A. I don't believe I signed a document like
25 this.

0551

1 Q. Do you know if this agreement accurately
2 memorializes the terms by which you were lending
3 money through Mr. Jowdy to Mr. Dalton?

4 A. I don't know the arrangement Mr. Jowdy
5 and Mr. Dalton ultimately agreed to.

6 Q. So just so the record is clear, you
7 never signed this agreement?

8 A. I do not believe I ever signed this
9 agreement.

10 Q. And is the information contained in the
11 agreement, the loan to Rodney Dalton, is this
12 accurate, in your view, or is this inaccurate?

13 A. I don't recall.

14 Q. Do you know if Mr. Dalton was going to
15 take the monies that you were transferring to him
16 through Little Isle IV or the Hawaiian entities, and
17 use it as an investment?

18 A. I don't know what his intention was.

19 Q. So this third page of Diamante Exhibit
20 35 says, "The funds from the credit line will be

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placed into an investment."

Is that something that was not your understanding?

A. I don't know the details of what Ken Jowdy and Rodney Dalton worked on.

Q. When you received this, did you call Mr. Jowdy and say, "Hey, what is going on"?

A. I think I actually forwarded an e-mail making a joke about the paperwork.

Q. Did you subsequently have conversations with Mr. Jowdy about the terms that appear in this agreement?

A. Ken Jowdy and I at that point in time probably spoke several times a day.

Q. Did you have a conversation with him?

A. I am sure I had several conversations with him about his optimism and excitement about getting these funds.

Q. Did you have a conversation specifically about the agreement and the terms that appear to be in the agreement between yourself and Mr. Dalton?

A. I don't recall.

Q. Do you remember having a conversation with anyone else that might recall, for example, maybe you spoke to an assistant or someone else about these terms?

A. Not that I recall.

Q. Do you know if you wrote any type of letter or e-mail about the terms of this agreement?

A. I don't recall.

Q. Looking at this agreement, the third page of Diamante Exhibit 35, do you believe that this is the terms that were ultimately agreed on between Mr. Dalton Mr. Jowdy?

A. I have no idea.

Q. Just looking at this, it doesn't seem to be that there is going to be monies transferred for, I believe your testimony was upwards of \$50 million in funding. It seems, rather, that Mr. Dalton is placing a line of credit or some monies that might be received in an investment. So I guess what I am trying to figure out is where is the disconnect. Meaning, it seems your testimony was that this was a hard money lender but this, rather, looks like from the terms of the agreement that something else is happening.

Can you explain?

A. I cannot explain. I dealt with Mr. Jowdy on this, who had asked for funds to be transferred based on some agreement he had with Rodney Dalton. Again, Ken Jowdy I used to speak on a daily basis, so much of his excitement of over this, I was aware of the excitement but not the details. He used to deal with his brother-in-law and attorney Bill Najam with respect to any lenders he was

approach for the Mexican project.

Q. I want to direct your attention about three or four pages further into the document, to an e-mail dated Tuesday, March 8th. You just talked about details or the lack thereof, do you see the

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e-mail dated March 8, 2005 at 4:27?

A. Yes.

Q. I believe it is from you.

Have you seen this e-mail before?

A. It looks familiar.

Q. Do you know if you sent this e-mail?

A. It appears I did.

Q. It says, "Todd, please call him. Until you get him tonight about ruby, please discuss all options with him RE selling, getting a LOC, et cetera, that we might want to explore now pending the info payment on the 22nd. Please let me know how it goes."

Was there going to be a payment on the 22nd of March?

A. I believe Ken Jowdy requested a second payment to Rodney Dalton.

Q. That's from you?

A. Yes, it was a further extension of the line of credit.

BY MR. SMITH:

Q. Do you know how much that second payment was?

A. I believe it was 125,000.

Q. And there had been one previous payment?

A. 750,000.

Q. Was there additional payments or was the total \$875,000?

A. I think it was 875.

BY MR. CASTANO:

Q. I want to direct your attention two more pages in to an e-mail dated Monday, June 13, 2005. It is a one-page document.

A. What was date on that?

Q. Monday, June 13, 2005.

A. Okay.

Q. Mr. Kenner, have you seen this before?

A. I believe so.

Q. "Rodney money," do you know what this e-mail is concerning?

A. I believe Jowdy had just spoken with me prior to this e-mail suggesting that his conversations with Rodney assured him that money was coming and he needed a bank account established immediately as if the money were pending within 24

hours. The first of many, many distributions to Jowdy.

Q. You write here, "I think we need to start creating a very, very clean record at this point."

Do you know what that refers to?

A. I think I was referring to the fact that Ken Jowdy was always requesting a lot funds into different bank accounts, and if there was going to be a funding source that needed to be repaid, which was going to be Mr. Dalton, then it should come out of a brand new bank account instead of one of Jowdy's commingled accounts that he used for multiple purposes.

Q. So we are clear, you believed that Mr. Dalton was going to be a hard money lender?

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17 A. That's correct.
18 Q. You didn't have any understanding that
19 the money was going toward investment of some kind?
20 A. Again, my understanding was that Mr.
21 Dalton had a very large ruby he was using as
22 collateral, and based on that collateral, he was able
23 to do something with some European banks to create a
24 funding source.
25 If that's what is referred to as an
0557
1 investment, that may have been it, but it was
2 European banks that would create this ongoing funding
3 source based on his collateral.
4 Q. What did you tell the Hawaiian partners,
5 be it Little Isle IV or Ula Makika, about transfers
6 to Mr. Dalton, if anything?
7 A. I don't believe we discussed much of
8 anything with those guys because it all fell under
9 the terms of ongoing loans being paid to Ken Jowdy.
10 Q. If it was, in fact, an investment that
11 wasn't a loan to Ken Jowdy, but an investment in a
12 ruby, would that have been -- excuse me, an
13 investment securitized by a ruby, would that have
14 been something you would have discussed with your
15 clients?
16 A. If you are asking if our Hawaii Group
17 was investing in a ruby --
18 Q. Well, the question is whether they were
19 investing in something securitized by a ruby, would
20 you have to tell your clients or members of Little
21 Isle IV?
22 A. If the Hawaiian members --
23 MR. STOLPER: I am going to object.
24 The question is unclear.
25 MR. CASTANO: I agree with you,
0558
1 Michael.
2 Q. If, in fact, monies being transferred
3 from Mr. Dalton were for an investment securitized by
4 a ruby or something else, is that something you would
5 have to tell your clients or members of Little Isle
6 IV?
7 MR. STOLPER: Investment in what?
8 A. Investment in what?
9 Q. In whatever it is that Mr. Dalton was
10 investing in.
11 A. Much the same as any other special
12 projects that we discussed openly and freely with all
13 of the members. If this deal with Mr. Dalton was an
14 investment for the benefit of the Hawaii members,
15 absolutely we would have talked about it.
16 (Whereupon, at this time, Mr. Stepaniuk
17 entered the room.)
18 Q. Just so we are clear, you didn't have
19 conversation with any Little Isle IV members about
20 the investment or the loans that went to Mr. Dalton?
21 A. In no context did I perceive that this
22 was an investment of some sort in Mr. Dalton or
23 through Mr. Dalton in anything. The conversations
24 would have ended at Ken Jowdy just requested some
25 more money and our running total is approximately X
0559
1 dollars.

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2 Q. The problem I am having with this is
3 that the monies don't go to Mr. Jowdy, the monies go
4 to Mr. Dalton. And there appears to be at least an
5 agreement that you received that doesn't necessarily
6 talk about hard money lending, but, rather, appears
7 to be talking about an investment securitized by
8 something.

9 Did you do any follow-up to or due
10 diligence to find out exactly what was happening
11 here?

12 A. The money, again, was at the request of
13 Ken Jowdy for projects that would be -- for project
14 funding outside the United States. So until you asked
15 the question just a few minutes ago, I have never
16 even once, until this moment, thought about any of
17 this as some sort of an investment in Mr. Dalton.

18 Q. Or investment opportunity through Mr.
19 Dalton?

20 A. That is correct. Never once until just
21 a few minutes ago when you mentioned it.

22 MR. STOLPER: But the document, Chris,
23 the investment, the reference, my inference is that
24 the document says it is an investment in either DDM
25 or Cabo San Lucas.

0560
1 MR. CASTANO: I don't know what you are
2 referring to, and I am not trying to difficult. I am
3 looking at the agreement and I am not seeing on page
4 3 of Exhibit 35 saying it's an investment in Diamante
5 Cabo San Lucas or Diamante del Mar.

6 MR. STOLPER: It says "fund from a
7 credit line will be placed into an investment,"
8 that's consistent with what he testified before you
9 showed him the document.

10 MR. CASTANO: I thought Mr. Kenner's
11 testimony was clear that Mr. Dalton was a hard money
12 lender and monies were being lent to Mr. Dalton with
13 the hopes of securitizing more lending for the
14 Diamante or Mexican entities.

15 A. Let me clarify. First, I did not
16 represent that the monies were being lent to Mr.
17 Dalton. I represented earlier that they were fees,
18 front-end fees, again, as all the hard money lenders
19 we encountered during those years.

20 Q. Okay.

21 A. And then the reference to it being some
22 sort of an investment, I think that I attempted to
23 clarify. That was I believe those fees helped Mr.
24 Dalton secure the arrangement with his collateralized
25 ruby to receive European bank funding that would then

0561
1 be able to be a loan to the Mexican entities. That's
2 the best I know about this.

3 The inference to it being some sort of
4 investment back to us or we were putting money into
5 some investment is brand new. It is the first I ever
6 heard of this in your questions.

7 Q. The ruby, did you ever see any documents
8 supporting that Mr. Dalton had a very valuable ruby?

9 A. I never saw anything.

10 Q. Did you ask to see any documents that
11 Mr. Dalton owned a very expensive piece of jewelry or
12 ruby?

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A. No. But Mr. Jowdy told me that he had received documents and shared it with a jeweler relative of his to confirm whatever he was working on.

BY MR. SMITH:

Q. You referred to forwarding these documents and making a joke to Jowdy.

A. Yes.

Q. Is that a reference to the first page of the document?

A. I believe so.

Q. And you write, "This is great. We should keep the script writer around in case we need

revisions on any Diamante website."

A. Yes.

Q. What did you mean?

A. I meant that this looked like it was written by a third grader, and Ken Jowdy and I carried on a very tongue in cheek relationship by text message when things were good and we were friendly. So I was making fun of the materials that were forwarded along.

Q. And did he reply?

A. I don't recall.

Q. Do you recall -- whether he replied by e-mail or not, do you recall having any kind of conversation with him about doesn't this look ridiculous, like it is written by a third grader?

A. Best I recall is as a result of whatever arrangement he was trying to make with Rodney Dalton, he told me his attorney, Tom Harvey, was reviewing documents with respect to this loan arrangement, because it appeared to be the finale of all of his funding efforts.

Q. Meaning Tom harvey was reviewing this draft agreement?

A. I don't know if Tom harvey reviewed this draft agreement or they found a six-year old to

review the draft agreement, but I was told by Ken Jowdy that his relationship with Rodney Dalton and the pending loan that Dalton was going to provide for the Mexican entities was all being reviewed by Tom harvey. And as I said earlier, everything that Jowdy touched was also reviewed by Bill Najam, who is an attorney as well, his brother in law.

Q. And you don't know what the results of that review were with respect to the transaction?

A. I do not. All I was requested as part of our open revolving line of credit was to forward money to bank accounts that Jowdy provided as part of loan arrangement we had with Ken Jowdy.

BY MR. CASTANO:

Q. You mentioned you felt that that was written by a six-year old or sixth grader?

A. Something tongue in cheek to that effect.

Q. Did you contact Mr. Jowdy and say, "What are we doing? Why would we lend money to a guy who sent us this document that on its face seems to be written by someone who doesn't know what he is doing"?

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24 A. I don't recall a conversation with him
25 other than what is memorialized here in the text

0564
1 message. I can only assume that whatever Mr. Jowdy
2 was going forward with, he was doing it under advice
3 of counsel, either Tom harvey or Bill Najam or both.

4 Q. I know we talked about Tommy Constantine
5 last time, but --

6 MR. SMITH: Just let me ask this
7 question.

8 BY MR. SMITH:

9 Q. I think you testified Little Isle IV
10 ended up providing 875,000 to Jowdy for the
11 transaction -- excuse me. On instructions of Jowdy
12 was provided to Dalton and Sheppard; is that right?

13 A. I believe so.

14 Q. Do you know whether any funds came back
15 from Dalton and/or Sheppard?

16 A. I do not. I, in fact, have been trying
17 for five years to get ahold of Ken Jowdy's bank
18 records to see what went on on that side of the
19 Chinese wall.

20 BY MR. CASTANO:

21 Q. We talked a little last time about Tommy
22 Constantine. Did Little Isle IV, the Hawaiian
23 entities, provide Tommy Constantine with fees for
24 hard money lenders?

25 A. If you don't mind, I didn't hear you.

0565
1 Q. Sure. We talked a little last time
2 about Tommy Constantine.

3 The question is: Did Tommy Constantine
4 receive from Little Isle IV, the Hawaiian entities,
5 finder fees for hard money lenders?

6 A. He received consulting fees, not finder
7 fees.

8 Q. And those consulting fees were for his
9 efforts in locating money lenders; is that right?

10 A. That's correct.

11 Q. Those were for no other purpose, the
12 consulting fees were for no other purposes other than
13 finder fees?

14 A. They were consulting fees to go find
15 funding for the Hawaiian entities.

16 Q. And Tommy Constantine never provided
17 anyone at Little Isle IV with drugs or anything like
18 that; is that correct?

19 A. Not that I am aware of.

20 Q. And Tommy Constantine received the funds
21 just for those purposes?

22 A. That's correct.

23 Q. The consulting?

24 A. Yes. I am a little taken back by the
25 drug comment.

0566
1 Q. Mr. Kenner, do you know if the Little
2 Isle IV bylaws authorized you to lend money?

3 A. Yes.

4 Q. You believe it did?

5 A. Yes.

6 Q. And do you believe the Little Isle IV
7 operating agreement allowed you to lend money?

8 A. Yes.

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Q. Do you believe the Little Isle IV bylaws authorize you to lend money to non-Hawaiian land acquisition projects?

A. Yes.

Q. Do you believe the Little Isle IV limited liability agreement authorized you to lend money to non-Hawaiian projects?

A. Yes, and let me make one clear statement.

The Little Isle IV bylaws and operating agreement through both the special projects provision and one amendment to the agreement sometime in '04, I believe, authorized the use of funding special projects, whether it be loans or otherwise.

When we closed the joint venture agreement with Lehman Brothers in the fall of 2006, that was a sticking point with Lehman Brothers, that

they didn't want to allow us to any longer be able to use Little Isle IV or any of our Hawaiian entities to also lend funds. So we had significant discussions with Lehman about that. And they made us, at the closing of the fall of '06 funding agreement, redo our operating agreement and remove all provisions that would allow us to act as a lending source or any other way. They rewrote the operating agreement, so it would basically make us nothing but passive investors from that point forward.

Q. Was there a Little Isle IV operating agreement or limited liability agreement prior to the agreement that was reached with Lehman Brothers?

A. There were several of them.

Q. Have they all been provided to us?

A. I believe everything I have in my possession I gave to you guys.

Q. Do you know if the limited liability agreements prior to the Lehman limited liability agreement concerning Little Isle IV has been provided to us?

A. What I can answer is that everything that I believe was ever presented certainly to the Nolan arbitration, which included, I believe, all of the bylaws and operating agreements prior to the

closing and the one we used for the closing have all been provided.

MR. CASTANO: Let's mark this Diamante Exhibit 36.

(NY-8125 Exhibit Number 36 was so marked for identification.)

MR. CASTANO: And can we mark this Diamante Exhibit 37.

(NY-8125 Exhibit Number 37 was so marked for identification.)

Q. Mr. Kenner, I am showing you what has been marked Diamante Exhibits 36 and 37. They both appear to be bylaws for Little Isle IV LLC.

Please take a moment to review them.
(Witness complies.)

Q. Just so the record is clear, I misread the document on top. Exhibit 36 is bylaws for Big Island VI Ventures. And 37 is bylaws for Big Island IV Ventures LLC.

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20 Let's focus on Diamante Exhibit 37, Mr.
21 Kenner. I will take back Diamante Exhibit 36.
22 (Hanging.)
23 A. Chris, at the next opportunity when can
24 we take a break?
25 MR. CASTANO: Okay. Let's take a break
0569
1 now before we ask any questions.
2 We are off the record at 2:27 p.m.
3 (Recess taken.)
4 MR. CASTANO: We are on the record at
5 2:41 p.m.
6 BY MR. CASTANO:
7 A. Mr. Kenner, while we were off the record
8 were there any substantive conversations between the
9 Commission staff and yourself?
10 A. There were not.
11 Q. Diamante Exhibit 37 is before you.
12 Have you had an opportunity to review
13 it?
14 A. I have not yet.
15 Q. Please do.
16 (Witness complies.)
17 A. Okay.
18 Q. Mr. Kenner, have you seen Diamante
19 Exhibit 37 before?
20 A. Yes, I have.
21 Q. What is Diamante Exhibit 37?
22 A. Exhibit 37 is one of the early versions
23 of bylaws for Little Isle IV.
24 Q. Are there other versions of bylaws?
25 A. I believe there were one or two other
0570
1 versions.
2 Q. For Little Isle IV?
3 A. Yes, before the first version was then
4 changed to be called the operating agreement.
5 Q. Just to be clear, there were other
6 versions of bylaws for Little Isle IV before there
7 was an operating agreement?
8 A. I believe so.
9 Q. Do you know if those have been produced
10 to us?
11 A. I don't recall.
12 Q. Do you know where they are?
13 A. Anything I had in my possession, was
14 able to find, were turned over.
15 Q. Do you know if in any other litigations
16 or any other arbitrations there have been produced
17 multiple copies of different bylaws for Little Isle
18 IV?
19 A. I believe so.
20 Q. And looking at this particular bylaws of
21 Little Isle IV, I want to direct your attention to
22 last page; is that your signature?
23 A. I believe it is.
24 Q. When you say you believe it is, is it a
25 possibility it is not your signature and someone
0571
1 forged it?
2 A. I believe it is mine.
3 Q. Do you know when this bylaw for Little
4 Isle IV was in operation?

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5 A. Solely based on the time stamp, which
6 appears to have been a faxed copy of this, I believe
7 it was in effect in and around December of '03.

8 Q. That's the time stamp that appears on
9 the bottom of the very first page and appears to be
10 on every page as well?

11 A. I believe so.

12 Q. Did you draft this or did someone else
13 draft it?

14 A. I believe I drafted it.

15 Q. Did you draft it in consultation with an
16 attorney?

17 A. I did not.

18 Q. Did anyone review it after you drafted
19 it?

20 A. It was reviewed by a number of people
21 including, but not limited to, Joe Juneau, Owen
22 Nolan, John Kaiser, Chris Manfredi, Christopher
23 Hawkins.

24 Q. And what was it reviewed for?

25 A. For agreement.

0572 1 Q. I want to direct your attention --
2 besides those four or five individuals that you just
3 mentioned, was it given to anyone else for any other
4 purpose?

5 A. Not that I recall at the time.

6 Q. Do you know if members of Little Isle
7 IV, besides those individuals you just mentioned,
8 received the bylaws of Little Isle IV?

9 A. I believe each one of them did.

10 Q. So each time someone became a member,
11 they received the bylaws?

12 A. No, that is not accurate.

13 The by-laws were changed and the
14 percentages were changed approximately five times
15 prior to the fall of 2006 Lehman funding of the
16 project, and during those five periods of time, the
17 bylaws or the subsequent operating agreement would be
18 disseminated amongst the members.

19 Q. Prior to someone becoming a member of
20 Little Isle IV, were they provided bylaws of some
21 sort?

22 A. Yes.

23 Q. And who provided it to them?

24 A. I did.

25 Q. Did anyone else, to your knowledge?

0573 1 A. As we said earlier, they may have been
2 distributed by other people.

3 BY MR. SMITH:

4 Q. You specifically recall distributing to
5 each of the investors in Little Isle IV the operative
6 bylaws before they became investors?

7 A. I can confirm that each of the members
8 did receive them, whether it came directly from
9 myself or somebody else, before they became a new
10 member they would have received the current version
11 of the bylaws.

12 Q. You said they would have. Did they, in
13 fact, receive?

14 A. Yes.

15 Q. How do you know that?

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16 A. In any meeting I had with people
17 requesting information about becoming a member, I
18 would either have a copy of it myself and hand it to
19 them, or if I didn't have an extra paper copy of it,
20 I would have made a request to one of my assistants
21 to e-mail a copy or mail a copy to the people.

22 Q. It sounds like you say would have either
23 had a copy or you would have made a request. It
24 sounds like you are remembering your practice at the
25 time.

0574 1 A. Yes. I don't want mince words, Justin.
2 I did either deliver in person, when I was there
3 discussing what was going on for the existing members
4 of Little Isle, or if I didn't have a hard copy with
5 me, we would have sent out a message while I was in
6 the meeting asking somebody to send it to them by
7 e-mail or by mail at the time.

8 Q. So for each of the investors in Little
9 Isle IV, you could identify whether you provided that
10 member with a copy in a meeting before they became an
11 investor or you had it provided in similar fashion
12 before they became an investor?

13 A. Correct.

14 Q. And in all cases, you specifically
15 recall for each investor that you, in fact, provided
16 the operative bylaws before they became an investor?

17 A. Yes.

18 BY MR. CASTANO:

19 Q. As bylaws changed and new versions of
20 bylaws were written, is that the case, were new
21 versions of bylaws were written?

22 A. They were.

23 Q. How many total versions of bylaws are
24 there?

25 A. I believe between bylaws and operating

0575 1 agreements, there may have been four or five prior to
2 the one Lehman Brothers wrote for us.

3 Q. I just want to focus on the by-laws now.
4 We will shift gears to the operating agreement next.
5 How many bylaws were written for Little
6 Isle IV?

7 A. I don't recall.

8 Q. Was there more than one?

9 A. I don't recall.

10 I do recall there was a transition from
11 using the term bylaws to the term operating
12 agreement. And to me it is just semantics.

13 Q. Just so we are clear, are you aware of
14 any other bylaws for Little Isle IV, not operating
15 agreements, just by-laws?

16 A. I am not sure.

17 Q. Just so that we are clear, you talked
18 about before there being multiple versions of bylaws.

19 ~~Could you have been thinking of it as~~
20 multiple versions of the operating agreements?

21 A. Again, I am using the terms
22 interchangeably. I don't recall whether I named the
23 first one bylaw and any subsequent one operating
24 agreement.

25 Q. I want to direct your attention to the

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1 first page of Diamante Exhibit 37, Article 2, The
2 Purpose, Section 1, "Little Isle IV LLC is an
3 organized group of investors established to invest in
4 land development projects in Hawaii."

5 Is that accurate?

6 A. The recital of it?

7 Q. Yes.

8 A. I believe that's what it says.

9 Q. Is that your understanding of what
10 Little Isle IV LLC's purpose was?

11 A. In 2002 and 2003, that was the original
12 purpose of the investments.

13 Q. And did there come a time that the
14 purpose of the investments changed?

15 A. Yes.

16 Q. When was that?

17 A. That was sometime in 2004 when we were
18 approached as a group by Ken Jowdy to offer loans to
19 Ken Jowdy to facilitate assistance with the del Mar
20 and future Cabo San Lucas projects.

21 Q. At that time in 2004, were the bylaws
22 amended?

23 A. Whether they were bylaws or operating
24 agreement, yes, they were amended.

25 Q. And this operating agreement, did it
0577

1 contain written terms that authorized you to lend
2 money to Ken Jowdy or to others?

3 A. Yes.

4 Q. And do we have a copy of that?

5 A. I don't know.

6 Q. Do you know anyone who has a copy of
7 that?

8 A. I would have to ask other people if they
9 have a copy of it or not. Everything I had in my
10 possession, considering the documents and the theft
11 that occurred that we discussed earlier, has been
12 turned over.

13 Q. Mr. Kenner, this seems like a pretty
14 important document.

15 Do you know if it exists or not?

16 A. I am sure it exists.

17 Q. Do you have it in your possession, to
18 your knowledge?

19 A. Everything that I had in my possession,
20 I turned over to you guys.

21 Q. Like I said, I think this is an
22 important document. Do you know if you have a copy
23 of it or not?

24 I understand you are saying to me I have
25 turned over everything to you. Do you have a copy of
0578

1 this important document?

2 A. I do not know if I have a copy of it or
3 not. Everything I had in my possession, subsequent
4 to the theft, I have turned over. If it is something
5 that I haven't turned over, it may be in other
6 people's possession.

7 Q. Are you saying you might have it, Chris,
8 I turned over everything I have. Or are you saying I
9 turned everything over and, no, I just don't have
10 this document?

11 A. I am saying I turned everything that I

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had in my possession. If there are documents that I did not have in my possession but I am aware of, they may exist and other people would have them.

MR. STOLPER: That's not the answer to the question.

THE WITNESS: I am not following the question.

MR. STOLPER: Let me get to end of it. Here is the question: Do you know when you made the production, because you reviewed all the documents before you gave them to Jay and me, did you see this document as part of your production?

He wants to know what is the likelihood that you produced it to him. He knows that you

turned everything relevant over. He needs to know is it in there, because he hasn't had a chance to review everything.

A. I don't recall as I sit here today how many by-laws and operating agreements in total were turned over to you guys. I do recall during the Nolan arbitration there were as many as four, to the best of my recollection, that were present during that arbitration.

BY MR. CASTANO:

Q. When you say four, would it be four by-laws that were present?

A. I can't delineate, as I sit here, if there was more than one bylaw, but bylaws, operating agreement, operating agreement, operating agreement.

Q. The operating agreement, you are referring to more than four operating agreements or bylaws for Little Isle IV or other Hawaiian entities that somehow swallowed up or became affiliated with Little Isle IV?

A. No. I believe specific to Little Isle IV.

BY MR. SMITH:

Q. I thought about five minutes ago you thought that there were five.

Is your best recollection that there were four or five?

A. You are speaking accurately. The fifth one, I believe, would have been the Lehman Brothers, the final one.

MR. STOLPER: His question was how many before Lehman.

Q. So four before Lehman?

A. That's correct, as I sit here today.

MR. STOLPER: Chris, it is the governing document. So it may be easier to refer to it that way. Whether it is labeled by-laws, operating agreement, it is the governing document and it would be easier to refer to them that way.

MR. CASTANO: Michael, let's go off the record and go outside for a second at 2:56 p.m.

MR. STOLPER: Sure.

(Discussion held off the record.)

MR. CASTANO: We are back on the record at 3:05 p.m.

Q. Mr. Kenner, while we were off the record, were there any substantive conversations

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23 between Commission staff and yourself?

24 A. There were not.

25 Q. Just so that the record is clear, Mr.

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1 Kenner, sitting here today you don't know if there
2 were multiple versions of the bylaws. You just don't
3 recall?

4 The bylaws, we are not talking about the
5 operating agreement?

6 A. Now we are getting in semantics of the
7 words again or did we agree to call it the governing
8 document.

9 MR. STEPANIUK: Chris is asking
10 specific about a document titled bylaws to the
11 exclusion of any other document.

12 Q. Sitting here today, are you aware any
13 other versions of the bylaws, the document that
14 appears in front of you, meaning that you have seen
15 other versions?

16 MR. STOLPER: The document entitled
17 "Bylaws"?

18 MR. CASTANO: Yes, the bylaws for
19 Little Isle IV.

20 A. I don't recall.

21 Q. Is it possible one exists?

22 A. It is possible.

23 Q. In terms of other governing agreements,
24 are you aware of other ones that might exist?

25 A. Yes.

0582

1 Q. How many -- and do you know what that
2 document was called?

3 A. I believe it would have been referred to
4 as the operating agreement for Little Isle IV.

5 Q. Is it also possible it was called the
6 limited liability agreement or Little Isle IV?

7 A. It is possible it was also called a
8 limited liability agreement for Little Isle IV.

9 Q. And that agreement, there might have
10 been multiple versions?

11 A. That's correct.

12 Q. Do you know, sitting here today, whether
13 that has been produced to us?

14 A. Based on discussions we have already
15 had, I am not sure if has been produced or not, but I
16 have discussed, while we were off the record, that I
17 will go back and look through the total production
18 that we did send out to you guys as expedited as we
19 could and see if there are documents that are
20 missing.

21 Q. In that production -- excuse me, in
22 those documents, I think you mentioned earlier that
23 the purpose section of the limited liability
24 agreements or the operating agreements may have made
25 reference to loans that Little Isle IV can make; is

0583

1 that right?

2 A. I don't believe it was in the purpose
3 section. I believe it was in the projects section.

4 MR. STOLPER: What number is that?

5 THE WITNESS: That would be Article 9.

6 Q. That's a different document. We are
7 talking about the operating agreement and the bylaws,

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8 right, so it could be a different section; is that
9 right?

10 A. It could be a different section.

11 Q. I know I don't have a document in front
12 of you, but sitting here today, do you know if any
13 operating agreement mentioned that Little Isle IV
14 could make loans outside of the Little Isle IV
15 universe of Hawaiian land investing?

16 A. I am 100 percent sure.

17 Q. And there is a document that says that?

18 A. Yes, there was.

19 Q. And do you know if this was a document
20 that was used in the Nolan arbitration?

21 A. I believe it was in the Nolan
22 production, correct.

23 Q. Did this document say you were
24 authorized, as managing member, to make loans outside
25 of -- in words or substance I get it, this is not

0584 1 what the document probably says, in fact, but
2 generally did it say that you were authorized to make
3 loans outside of the Little Isle IV Hawaiian
4 universe?

5 A. Absolutely.

6 Q. It said that in writing?

7 A. Yes, it did.

8 Q. And it said it in writing. Sitting here
9 today, do you recall if this was something that was
10 part of the Nolan arbitration?

11 A. I believe it was.

12 MR. STOLPER: When you say "part," was
13 it just produced or was there testimony with respect
14 to it?

15
16 THE WITNESS: I believe there was some
17 testimony related to that agreement and its existence
18 and the language. Not all of the documents in the
19 Nolan case that were produced were admitted as
20 evidence during the arbitration, but I am 100 percent
21 sure that that document was available during the
22 arbitration.

23 Q. Do you know if it was discussed during
24 the arbitration?

25 A. There were questions regarding the

0585 1 existence of that language and the ability to do so,
2 but during the arbitration, to the best of my
3 recollection, in the five days we spent less than ten
4 minutes in Q & A about the ability for Little Isle IV
5 to loan money outside the scope of its Hawaiian real
6 estate.

7 BY MR. STEPANIUK:

8 Q. When did you last see a Little Isle IV
9 governing document other than what we have shown you
10 here today?

11 A. Certainly during the Nolan arbitration,
12 which I don't recall the dates of that arbitration,
13 perhaps 2008. And after that, I don't believe there
14 were any more open litigation that had any reference
15 to Little Isle that I needed to go back and look
16 through those documents. So perhaps during the
17 arbitration in 2008 or 2009, I forget when it was,
18 was the last time I had seen that grouping of

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documents that had to be put together in production.

Q. Other than the ones we have shown you here today?

A. Other than the ones you have shown me here today.

BY MR. CASTANO:

Q. I will direct your attention to the

third page, the special projects page. Take a moment to review Article 10, Special Projects.

(Witness complies.)

A. Yes.

BY MR. SMITH:

Q. You testified that, as I understand it, the bylaws or operating agreement that we don't have that existed subsequent to this one allowed the lending of funds to Ken Jowdy?

A. To outside entities, correct.

Q. Including Ken Jowdy?

A. Yes. It did not specifically name Ken Jowdy.

Q. But it did allow lending funds to outside entities?

A. Yes, it did.

Q. Is it also the case this set of bylaws do not allow the lending of funds to outside entities?

A. I believe it is ambiguous as to whether or not it does. That's based on the questions I am receiving from you guys. I believe that under special projects if the objectives of the LLC were to earn money as an investment and what we deemed was a reasonable investment, if it was consistent with the

overall objectives of the LLC, and I believe the objectives were to earn money for the members, I believe we did have authorization under special projects.

It was more clearly defined in later versions of those governing documents and specifically in early to mid 2006, it was a real sticking point with Lehman, that they didn't want us to leave that language in the agreements any longer. Thus, they made us sign brand new operating agreements that were tailored to their specifications for what they wanted Little Isle or any other future entity to be able to lend or not lend.

Q. I thought your testimony earlier had been that the bylaws or operating agreements, the governing documents, were amended subsequent to this one to allow lending to outside entities; is that right?

A. Let me be real clear. I believe that the special projects section already allows us to do that under these bylaws, this version of the by-laws.

~~There were subsequent amendments that~~
were very specific when it came to dealing with lending, which ultimately became the Ken Jowdy loans. That section and that language was forced by Lehman

Brothers for us to take out in 2006. And I know that document was turned over to you.

Q. The language allowing lending to outside

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4 entities was forced out by Lehman Brothers, but I
5 thought you testified earlier that it was initially
6 put in subsequent to this set of bylaws to allow
7 lending to outside entities?

8 A. It was done, to be very clear, so it
9 could not be left open for interpretation prior to us
10 lending money to Ken Jowdy.

11 Q. What was the cause for doubt as to the
12 clarity of these operating agreements -- excuse me,
13 these by-laws?

14 A. I think I was being proactive with the
15 partners to make sure it was very clear as opposed to
16 leaving it open for interpretation.

17 Q. Was that pursuant to some discussions
18 that you had prior to amending to, I guess as you
19 said to more that explicitly clarify that lending
20 money to outside entities was permissible?

21 A. No, I don't believe so. But in context
22 of by-laws, operating agreements and limited
23 liability agreements, as we continued to migrate from
24 the first draft to the final draft that Lehman
25 authorized, there were subsequent changes through it,

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1 the language changed, and, again, to create
2 subsequent clarity some of the language changed based
3 on exactly what was going on, to make it very clear
4 in layman terms.

5 These were not agreements drafted by
6 lawyers. I was drafting them.

7 Q. Was there anything that occurred that
8 made this set of bylaws less than clear on that
9 point?

10 A. To me, no.

11 Q. What was the motivating factor, what
12 caused you to suddenly realize that it might be
13 better to have them amended to provide greater
14 clarity on the lending point?

15 A. I don't think it was anything that
16 suddenly led me to that. I think during one of our
17 subsequent additional member distributions of a newer
18 version of the bylaws, operating agreement, limited
19 liability agreement, that language was added.

20 BY MR. CASTANO:

21 Q. You mentioned earlier that one of the
22 endeavors or objectives was to make money.

23 Turning back to the first page, Article
24 2, The Purpose, why didn't you put a clause in there
25 that said in words or substance: while we are

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1 interested in investing in Hawaiian land, we are
2 going to consider all opportunities that come along
3 to further the membership's interest in making money
4 even if it is not necessarily connected to
5 establishing or investing in land development
6 projects in Hawaii?

7 A. In as much as we want to split hairs
8 about special projects, whether it allowed as an
9 objective to make money, the loans that we felt were
10 secure, I did, as the managing member, this also
11 wouldn't address our desire to create a water
12 bottling company, or to have created a landscape
13 nursery company that we felt also fell within the
14 scope of special projects.

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Q. There seems to be a difference, and tell me if I am wrong, you actually lent money. Did you establish a Hawaiian water bottling company?

A. We got right to the doorstep of establishing that, as we did get into purchase and sale contracts with an existing landscaping company, as did we also get right to the doorstep to acquire land to have the quarry.

Q. Have that all been provided, all the documents and correspondence with water companies and all that information?

A. I don't know where those documents exist.

Q. So they haven't been produced?

A. Not that I believe.

Q. Any contracts entered into with any water bottling company, plastic company?

A. No. What you would have received is purchase contracts on the land that have the quarries on it. You would have purchase and sale contracts for land that has the nursery on it.

Q. Do we have those contracts?

A. I believe you do. Those were options that were still open and available to us at the closing and the subsequent managing member decided not to pursue it.

MR. CASTANO: I want to mark this as Diamante Exhibit 38.

(NY-8125 Exhibit Number 38 was so marked for identification.)

Q. Mr. Kenner, would you like clarify something?

A. Sure. Just to clarify, relative to the amendments that occurred to the governing documents, I am not sure that in 2003 or 2002 when the original by-laws or governing documents were established that

it was a consideration of ours in the early stage to provide lending to anybody else.

I think that became an option down the road that migrated into the subsequent versions of the bylaws, operating agreements or limited liability agreements.

BY MR. SMITH:

Q. Your testimony, though, was that even prior to that point, prior to that migration, that this version of the bylaws allow lending to outside entities?

A. I think it is grand in scope and allows us to pursue any number of those things that we talked about, whether it be a nursery, a rock quarry or a lending.

Q. What provision in the bylaws allows the lending in particular?

A. Again, by definition it's an interpretation of what I felt the overall objectives of the LLC were, and I delineate that from what you perceive as the purpose of the LLC. The purpose would be a land investment, and I don't see a rock quarry or a nursery or a lending option as falling inside the scope of that.

Had we concluded one of those land

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1 purchases that held the rock quarry, land purchase
2 that held the nursery, or if we thought we were about
3 to finish those, I believe the bylaws would have been
4 changed again to include language that would be very
5 clear about that, so there would be no question among
6 the members does this fall inside scope.

7 I was trying to be very proactive during
8 these additional changes in the bylaws, but as I sit
9 here and have had to review this document that
10 drafted in '02 or '03 infinitum, I believe when I
11 read special projects, the overall objective of the
12 group was to make money. And if lending money at 15
13 percent interest to what we believed was a secure
14 investor, I believe it falls under special projects.
15 And had Mr. Jowdy paid us in '06, as he was supposed
16 to, we would have had incredibly happy investors. We
17 were defrauded by one of our closest friends and ally
18 at the time.

19 Q. Just so I understand, your testimony is
20 that lending was allowed in addition to the various
21 other projects you described, based on the purpose of
22 the project was to make money?

23 A. Based on the objectives of the project
24 was to make money.

25 Q. And is that objective specified anywhere

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1 in the bylaws?

2 A. I believe in the special projects,
3 "special projects shall be established by Little Isle
4 IV to promote the gathering of information in
5 specialized areas related to all endeavors of the
6 LLC, assuming that they are relevant to the overall
7 objectives of the LLC." And I believe the overall
8 objective of the LLC was to make money.

9 Q. Where is that objective specified?

10 A. I don't think it is. That's my point,
11 when we got to the future versions of the bylaws or
12 operating agreements, I tried to take a proactive
13 approach to put it in there.

14 Q. Putting aside the future versions, just
15 referring specifically to this version, the sentence
16 you just read indicates that "The special projects
17 shall be established by Little Isle IV LLC to promote
18 the gathering of information in specialized areas
19 related to all endeavors of the LLC, assuming they
20 are relevant to the overall objectives of the LLC."

21 So the projects would have to be
22 relevant to the overall objectives of the LLC. You
23 testified making money is not specified as an
24 objective of the LLC; is that right?

25 MR. STOLPER: I also note that there is

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1 no section that is says "Objectives of the LLC."

2 MR. SMITH: I understand.

3 A. That's my point. Again, I am not a
4 lawyer. This was drafted up for five or six friends
5 to feel comfortable that there was a governing
6 document at the beginning. I believe it did address
7 all those. In hindsight as I look at it as I sit
8 higher today, it addresses the grander scope of the
9 overall objectives of the entity was to make money.
10 I don't know for what other purpose we would be

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involved in the business if it wasn't to make money.

Q. There is section that describes the purpose of the LLC?

A. I am talking about what I perceive here reading this today, eight years later, is our objective is to go to Hawaii and gather up group of friends ultimately to invest and make money.

Q. But the document itself has a purpose section that says that the purpose is to establish and invest in land development projects in Hawaii?

A. Justin, again, as we split hairs here, there isn't an objective section. So if we want to split hairs on the bylaws, it would have been more appropriate if I was trying to put together -- again, this was drafted very quickly for the purpose of

several friends -- I would have referred to that as the overall purpose of the LLC. I am telling you the objective of the LLC was to make money. The purpose was to originally go to Hawaii.

Q. So you are distinguishing between the objectives and purposes of the LLC?

A. Yes.

Q. And the unspecified objective was to make money and the purpose was something else?

A. I believe the purpose, again, I am not a lawyer and I wasn't drafting this with a legal background. The definition of this agreement was to create a general sense that we knew what we were doing amongst a group of five or six friends.

As that grew larger, there were amendments made to the bylaws and subsequent operating agreements that more specifically addressed some of those issues, one of which was the specific lending that we were going to consider as part of the projects.

MR. STOLPER: When you drafted this, you wrote the words "Special Projects" there. Was that intended to be limited to Hawaii and the land acquisition in Hawaii?

THE WITNESS: Not at all.

BY MR. CASTANO:

Q. Why didn't you say that then?

A. As we sit here today, Chris, we could have listed 15 more paragraphs that outlined everything and anything we would ever do for the following decade, but that wasn't the purpose for drafting this up. It was really to make guys feel like, as we purchased the very first piece of land which totalled \$720,000, that everybody felt like they had a piece of paper to show their wives.

Q. Do you know that there are members of Little Isle IV that believe you never told never told that the money wasn't going to go to Hawaii projects? Whether you believe them or not, there are people out there that say that; is that correct?

MR. STOLPER: People unspecified?

MR. CASTANO: There are members of Little Isle IV that say that.

MR. STOLPER: You have to name them. You can't ask a general question like that. He has already testified there is one person, Owen Nolan.

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22 Q. Is there anyone else, Mr. Kenner?

23 A. No that I believe.

24 Q. Have you ever heard anyone else say
25 that?

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1 A. Only Owen Nolan.

2 Q. No one else has ever said that?

3 A. I heard Christine Myrick say it. She is
4 no longer a member of the group.

5 Q. Did Mr. Boyle ever say that? Mr. Dan
6 Boyle, did he ever say he didn't know his money was
7 going to be used for other things other than an
8 investment in Little Isle IV?

9 A. No, I don't believe that is what I
10 recall. The only thing I remember from Dan Boyle was
11 after he was having an affair with Christine Myrick,
12 he began to question five years of what was going on.

13 Q. Did Mr. Boyle ever say that he didn't
14 know his money was going for other purposes other
15 than Little Isle IV?

16 A. I believe there is an affidavit that he
17 signed on behalf of Mr. Meeks and Mr. Nolan for the
18 arbitration but it was certainly an affidavit drafted
19 by Mr. Meeks for Mr. Boyle to sign.

20 Q. Regardless, did Mr. Boyle sign an
21 affidavit that said in words or substance that he
22 didn't know that his money and his investment in
23 Little Isle IV would be used for loans, to your
24 knowledge?

25 A. I have read an affidavit by Mr. Boyle

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1 that I believed was very inconsistent with any
2 conversation that I ever had with Mr. Boyle.

3 Mr. Boyle fell at odds with me when I
4 caught him having an affair with Ms. Myrick which led
5 to her subsequent termination and he was afraid in
6 the Nolan case that he and his wife would be called
7 to testify. He subsequently sent me a threatening
8 e-mail through Darryl Sadore (ph) telling me the next
9 time he saw me would be my last time. And I believe
10 that was also turned over to you guys.

11 Q. Besides Mr. Nolan and Mr. Boyle, is
12 there anyone else that would they didn't know, to
13 your knowledge, that their investment in Little Isle
14 IV would be used for loans and other purpose other
15 than an investment for development in Hawaiian
16 properties?

17 A. Not to my knowledge.

18 MR. STOLPER: Are you clear on the
19 timing of the questions? You may want to be more
20 precise about that.

21 MR. CASTANO: I thought the question
22 was precise.

23 MR. STOLPER: It wasn't with respect to
24 timing. You asked the question has anyone ever said
25 that they weren't told that monies they were

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1 investing in Little Isle IV would be used outside
2 Little Isle IV 4, but there is no qualification as to
3 when they were told that.

4 MR. CASTANO: It isn't what they were
5 told. It is what they say.

6 Q. Is there any investor in Little Isle IV

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7 or member of Little Isle IV who would say that they
8 weren't told that their monies would be used for
9 purposes of developing Hawaiian property?

10 MR. STOLPER: They were not told at any
11 time, as opposed to when they invested?

12 Q. Is there anyone who would say it,
13 period. I guess your testimony is I disagree with
14 them.

15 I am asking are you aware of anyone who
16 would say they weren't told or provided written
17 documents that said their monies would be used not
18 for Little Isle IV development of Hawaiian
19 properties, but instead, to be sent off as loans to
20 other entities?

21 A. I believe other than Owen Nolan and
22 anyone else that attorney Michael Meeks or Christine
23 Myrick had manipulated, I can't imagine anybody that
24 would have said that.

25 As I sit here today, I can't even

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1 confirm that I believe Dan Boyle would sit here and
2 say that. I can only confirm that I believe Owen
3 Nolan would say that or attempt to say that, as he
4 did in testimony.

5 Q. Did you see an affidavit that Mr. Boyle
6 created?

7 A. Yes, I turned it over to you guys.

8 Q. Did Mr. Boyle say in the affidavit that
9 he didn't know in words or substance that his
10 investment in Little Isle IV was going to be used for
11 loans to other entities?

12 A. I don't recall specifically what his
13 affidavit said. Although I know he took an adverse
14 role to what his investment was.

15 Q. Mr. Kenner, you remember specifically
16 providing us with Mr. Boyle's affidavit?

17 A. Yes, I do.

18 Q. Just so the record is clear, you can't
19 remember whether you provided us with an operating
20 agreement or bylaws that discusses in detail, in
21 words or substance, that loans can be made by Little
22 Isle IV to other entities?

23 A. I actually, in fact, recall that because
24 when I was putting together the production for you
25 guys, I was very bothered to come across the threat

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1 that Dan Boyle had made to me through Darryl Sadore,
2 so when I did, it triggered me to go back and reading
3 his affidavit -- excuse me, not reading his
4 affidavit, getting the affidavits that Mr. Meeks had
5 asked people to sign on Mr. Nolan's behalf. That's
6 why I recall the Dan Boyle affidavit, because I sent
7 several to you.

8 Q. Have you ever asked anyone to sign an
9 affidavit on your behalf?

10 MR. STOLPER: In general?

11 Q. Yes. In any arbitrations you have been
12 involved in in the last five years?

13 A. I have only been involved in one
14 arbitration.

15 Q. Have you ever asked anyone to sign an
16 affidavit on your behalf for any litigation or
17 arbitrations in the last five or six years?

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18 A. Yes.

19 BY MR. STEPANIUK:

20 Q. I want to address the distinction Mr.
21 Stolper was making. I think the questions Chris has
22 been asking you have been answering refer to anybody
23 ever saying that they were never told at any time
24 that Little Isle funds could or would be used for not
25 Hawaiian land development purposes.

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1 Now I want to ask more narrowly, are you
2 aware of anyone who has said that they were not told
3 at the time they invested in Little Isle that Little
4 Isle funds could or would be used for non-Hawaiian
5 land development purposes?

6 A. I don't believe anybody could say that
7 in truth.

8 Q. Aside from truth or falsity of any such
9 statements that might have been made, are you aware
10 of anyone making such statements?

11 A. I believe Owen Nolan. And I believe
12 also through rumor that Christine Myrick has been
13 making those accusations to many people as she could
14 get an audience after she was terminated.

15 Q. Anybody else?

16 A. Not that I am aware of.

17 Q. So it is the same group of people who
18 say they were never told as who say they weren't told
19 at the time that they invested?

20 A. That's correct, to the best of my
21 knowledge.

22 BY MR. CASTANO:

23 Q. Besides Mr. Nolan, are there any
24 proceedings with you and anyone else?

25 A. Not that I believe.

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1 Q. In the last five or six years?

2 MR. STOLPER: Proceedings meaning?

3 MR. CASTANO: Broadly defined,
4 arbitrations in court, litigation.

5 A. There have been quite a few.

6 Q. Putting aside your disputes with Mr.
7 Jowdy, were there any disputes between you and Mr.
8 Juneau?

9 A. Yes, there were.

10 Q. Anyone else? Any other former clients
11 of yours or anyone else?

12 A. Ethan Moreau and Jozef Stumbel.

13 Q. Has Tommy Constantine sued you for any
14 reason?

15 A. He filed a cross-complaint against me in
16 a case that I was not a plaintiff in.

17 MR. STOLPER: Counterclaim.

18 A. Counterclaim.

19 Q. Let's move to a document that has been
20 previously marked about 15 minutes ago, Exhibit 38.
21 Please take a moment to review that.

22 (Witness complies.)

23 Q. Mr. Kenner, what is Diamante Exhibit 38?

24 A. Exhibit 38 a limited liability company
25 agreement for Little Isle IV that was authored and

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1 produced by Lehman Brothers as a requirement for the
2 closing that happened in the fall of 2006.

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Q. Are you aware of other limited liability agreements for Little Isle IV?

A. I believe there was at least one governing agreement that was titled limited liability company agreement prior to this one.

Q. Just so that we are clear, between bylaws and limited liability company agreements, you believe that there might be three or four documents prior to this one?

A. Yes, I believe there were several documents prior to this one, as we have discussed.

Q. Are there any ones after this date, to your knowledge, any limited liability company agreements for Little Isle IV after April 26, 2006?

A. This was the last one.

Q. And there are no other ones?

A. This was the last one.

(Witness and counsel confer.)

MR. STOLPER: We should note for the record that Exhibit 38 does not appear to reference any other documents other than the bylaws. It also seems to be sloppy in its form in that on the very first the very first whereas clause refers to Big

Isle VI as opposed to Little Isle IV. So I am not sure how much attention to detail the scribe here had.

Q. Did you review this document Mr. Kenner?

A. Yes.

Q. Did you review it before this document was signed by various members of Little Isle IV?

A. I don't recall.

Q. Do you know if, in fact, this document was signed by the members of Little Isle IV?

A. Based upon review of the document today, I believe it was.

Q. Do you know how these signatures got on this document?

A. At the time the execution of this document was required, I believe I faxed a copy of this document to each and every one of the members and each and every member, in turn, faxed me back their signature pages.

Q. Is there any allegations that you are aware of of anyone saying you forged their signatures on this document?

A. On this document, I am not aware.

Q. Turning to page 10 of the document, membership and percentages.

A. I am on page 10.

Q. I note there is various percentages and membership interest?

A. Yes.

Q. Looking at that, is that accurate and credit for the time this document was signed?

A. It appears to be.

Q. Were you only a .01 percent owner membership interest in Little Isle IV?

A. At that point I was. That's how Lehman Brothers wanted me to be listed as the managing member of the entity, as .01.

Q. Did there come a time where that

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percentage increased?

A. Yes, after I bought Christine Myrick out of her shares.

Q. And how much did she have?

A. It says she .56 percent.

Q. So your interest increased to .57 percent; is that correct?

A. If I were still a managing member at that time, yes. If not, it increased to .56.

Q. And did there ever come a time that you became a larger membership owner of Little Isle IV?

A. From that point forward, no.

Q. From that point forward meaning from the time you acquired Christine Myrick's position?

A. Correct.

Q. Do you know if after April 26, 2006 Little Isle IV ever made any loans to any other entity?

A. I don't believe so.

Q. Are you certain of that?

A. I am fairly certain.

Q. When did you cease being managing member of Little Isle IV?

A. Sometime after the closing in the fall of 2006.

Q. And who became managing member?

A. I believe John Kaiser became the managing member and still is managing member.

Q. What role did you have at Little Isle IV after fall 2006?

A. Just managing member until I believe that transfer occurred.

Q. And were bank accounts transferred at that time? Meaning at the time Lehman Brothers acquired Little Isle IV, were the accounts transferred to Lehman Brothers?

A. No.

Q. Who were they put in possession of, if anyone?

A. There was no cash left in the bank accounts.

Q. Okay, I will take it back, thank you.

A. Can I just look at it for one moment.

Q. Sure.

(Witness and counsel confer.)

Q. I know we discussed a little earlier the total investor proceeds that I believe you said, or membership contributions to Little Isle IV prior to Lehman's involvement was approximately \$11 million, give or take; is that right?

A. That's approximate.

Q. Could that number be a little bit lower?

A. Could be.

Q. Could it be upwards of maybe only \$8 million?

A. No.

Q. You believe it is more than that?

A. Yes.

MR. CASTANO: Please mark this as Diamante Exhibit 39.

(NY-8125 Exhibit Number 39 was
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so marked for identification.)

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1 Q. I am showing you what has been marked
2 Diamante Exhibit 39.

3 Please take a moment to review that.
4 (Witness complies.)

5 A. Okay.

6 Q. Mr. Kenner, have you seen Diamante
7 Exhibit 39?

8 A. Yes, I have.

9 Q. What is Diamante Exhibit 39?

10 A. Exhibit 39 is a letter that was authored
11 by Bill Najam and attorneys for Lehman Brothers to
12 memorialize the joint venture agreement between our
13 Hawaiian entities and Alan Warden and Windwalker and
14 it also outlined all of the disclosure and
15 participation I had and the other members had for
16 contribution sake and ongoing participation, and it
17 asked for each one of the Little Isle members to
18 acknowledge all of these disclosures and grant
19 authority to act and consummate a joint venture
20 agreement.

21 Q. Did send this letter?

22 A. Yes, I did.

23 Q. Did you sign this letter?

24 A. Yes, I did.

25 Q. Is everything in this letter accurate,

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1 to your knowledge?

2 A. To the best of my knowledge, it is.

3 Q. When you were speaking to Mr. Najam
4 about the letter, did you have any conversations with
5 him about what the content of the letter should be?

6 A. Not in particular, no.

7 Q. How about in general?

8 A. The letter was presented to me by Mr.
9 Najam and the Lehman attorneys saying this is what
10 they would accept as a disclosure. My contribution
11 to it was a breakdown of the percentages that they
12 needed for the partners. Everything else was
13 presented to me as this is what we needs as a
14 disclosure signed.

15 Q. I note on page six this document is
16 signed, but you believe you did sign this letter at
17 some point?

18 A. Yes.

19 Q. Do you believe you signed this letter on
20 or around July 21, 2006?

21 A. Yes.

22 Q. I want to direct your attention to the
23 fourth paragraph, "The total investment today of the
24 company, our partners and me, in a parcel is
25 approximately \$8 million."

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1 A. That's correct.

2 Q. We talked a little bit earlier about how
3 much was invested in Little Isle IV.

4 A. Yes.

5 Q. Do you believe that number is closer --
6 maybe it wasn't \$11 million, it was \$8 million, or is
7 there something I am missing?

8 A. I think you may be missing something so
9 perhaps I can clear it up. I heard these comments

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from a lot people over the last few years.

That paragraph represents the \$8 million cash that was invested and spent on land parcels and development costs up until the point of the joint venture. The 11 or 12 or 13 million dollars we talked about before would also include the outstanding loans at that point in time that were made to Ken Jowdy. But this was not letter written by Lehman Brothers to disclose the state of the union of the Little Isle partnership.

This is clearly and solely a letter that they needed as disclosure for each of the Little Isle IV members to understand the content, context and direction of the new joint venture so they could get them to sign off on it.

Q. So why wasn't there something that said

that the total amount raised was 13 million. You are saying it was 8 million?

A. That's not correct.

I am saying that the letter is accurate. It says the total investment to date of the company, our partners and me, in the parcels, and the parcels is referring to what we were contributing to the joint venture, totals approximately \$8 million.

MR. STOLPER: Parcels is a defined term.

Q. Mr. Kenner, so we are clear, the monies that were coming in to Little Isle IV, did you break it down in any way at the time, meaning we are going to take in \$8 million, we are going to use that \$8 million to acquire land, and these \$4 million that came in we are going to give to or send to the Jowdy entities as a loan?

MR. STOLPER: Objection, it has been asked and answered, and he has also testified that at the time that the monies were raised initially, monies were not, they didn't have any anticipation or expectation to lending to Jowdy. So when you ask that question you are simplifying five years of history into one false premise. That's my problem.

Q. Were there any written documents, Mr.

Kenner, about how you would go about in any way distinguishing monies that came in?

A. Distinguishing them to who?

Q. Means monies would be used for the Hawaiian acquisition and then other monies would be used to send to Jowdy.

Were there any written documents about this?

A. No specific documents.

MR. STOLPER: Other than the bylaws that we already have testimony on.

Q. Do the bank records show approximately \$8 million or \$11 million coming in to Little Isle IV during the period of 2003 through 2006?

A. Yes, I believe so.

Q. Was there any monies invested in cash?

A. I don't believe so.

Q. So your testimony is that monies that went to fund the land were approximately \$8 million?

A. That's correct. And that total I had to

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represent to Lehman Brothers prior to this letter being written.

Q. How come this letter doesn't have any information about the lending to Jowdy from Little Isle IV?

MR. STOLPER: Asked and answered.

Q. Why doesn't the letter have it?

MR. STOLPER: He has already answered that.

Q. Can you answer it again for the slow-witted person here?

A. This letter was drafted by Bill Najam and Lehman Brothers' counsel as the disclosure requirement they needed to close the joint venture. This was not a state of the union Little Isle IV all-encompassing letter.

There are several other things that this letter does not disclose that are relevant or irrelevant to the actually closing of the joint venture.

Q. It strikes me as odd that it gets into lot of detail but you didn't include or asked for it to be included the approximately \$5 million loans to Jowdy.

Was that discussed in any way with Najam or counsel?

A. In fact, in the spring of 2006, at the closing of the Cabo deal, that same Lehman counsel and the same Bill Najam were involved with it. They were very aware in the spring of '06 that Jowdy owed

up approximately \$7 million at the time. They were all aware of that.

The same gentlemen are the ones who constructed this letter. So I can't speak for Masood Bhatti or what he didn't want his other superiors at Lehman Brothers to know, but this was apparently a letter that had to go to, as I was told, to Lehman's committee to approve this loan.

Just to get a flavor of how long these negotiations were going on, that operating agreement that we looked at from April 26th was being pressed on me as if we were closing the loan originally at the end of April. And the last requirement was to take out the lending provision in the operating agreement. This is now three months later, and after more acrimony, they are now requiring a disclosure letter on top of all the operating agreements.

Q. Did you send this to your clients?

A. Yes, I did. I sent this out to all the members of Little Isle IV?

Q. Did you have any conversations with them about, wait a second, we are talking about the \$8 million used to develop the property, but there is an outstanding \$5 million out there or there are loans out there that should probably also be included?

Did you have any conversations with anyone?

MR. STOLPER: Objection. You are injecting an irrelevant point into a transaction that has nothing to do with the loans.

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MR. CASTANO: I think it is relevant and I am allowed to ask it.

MR. STOLPER: Well, you are wrong.

MR. CASTANO: You can think I am wrong but I am allowed to ask the question.

MR. STOLPER: You also said it is odd. The only thing odd is your question.

MR. CASTANO: That's fine. We are allowed to ask the questions. You can object.

MR. STOLPER: I am.

Q. This is document that went to your clients, we are talking about 4 or \$5 million, perhaps even more, that went to loans. The letter doesn't say anything --

MR. STOLPER: It shouldn't if you know anything about disclosure letters.

Q. Do you know why it doesn't say anything?

A. Because it is a disclosure letter, as I answered before. This was not a state of the union letter for Little Isle IV members.

Q. It does seem to be very detailed including all the transactions and consolidations.

MR. STOLPER: But you are not focusing -- tell him what the disclosure is for. He doesn't seem to get it.

A. The disclosure was for Lehman Brothers' committee to understand that the members of Little Isle IV knew all the components of the joint venture that was about to happen between the Hawaii members and Alan Worden's group and Windwalker. That is what this disclosure letter was for. It was not a state of the union letter.

MR. STOLPER: Forget state of union. Did it have anything to do with the loans?

THE WITNESS: No.

MR. STOLPER: Do the loans impact the shareholder changes that are reflected here?

THE WITNESS: Absolutely not.

BY MR. CASTANO:

Q. Did you have any conversations with anyone about whether that should be included, the loans that went to Jowdy?

A. I don't recall.

Q. You don't recall having a conversation with anyone included in Jowdy's universe, Mr. Najam

or otherwise, about should the letter also include the fact that approximately one fourth to one third of our money raised went to loans to Mr. Jowdy's entities?

MR. STOLPER: Same objection.

Q. The question is: Did you have any conversations?

MR. STOLPER: He already answered that. He doesn't recall.

Q. You don't recall?

A. I don't recall specific conversations.

Q. Do you recall a general conversation?

A. I remember a lot of general conversations with both Masood Bhatti and Bill Najam about their reassurances that Ken Jowdy, through Masood Bhatti's words and Lehman's slush fund, were

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going to pay back those loans. Ultimately, at the end of the day, this letter was placed in front of me as the disclosure letter that Lehman needed to put in front of their committee. When I say Lehman, I mean Masood Bhatti needed to put in front of his committee, so each of the Little Isle IV members would have awareness that this joint venture was occurring. It was very simple.

BY MR. SMITH:

Q. I have one question.

You testified that in the spring of 2006 the amount owed by Jowdy to Little Isle IV was about \$7 million?

A. Yes.

Q. And I thought you had testified earlier that the peak amount was \$5 million or was that just principal?

A. Principal.

Q. So at this point, \$2 million or so of interest had already accrued?

A. Yes.

Q. And what's the current amount owed? Have you calculated it?

A. I stopped at about 10 million.

BY MR. CASTANO:

Q. Were there any conversations with Lehman Brothers concerning the one-page loan document that you referenced earlier in your testimony?

A. I missed the first half of your question.

Q. Were there any conversations with Lehman Brothers concerning that one-page loan document that you referenced earlier in your testimony? The loan document with the 15 percent interest rate that you

talked about.

A. The conversations that were related to the loan to Ken Jowdy were that Masood Bhatti was aware of it and was going to make good on Jowdy's loans at the closing of the 2006 Cabo document.

Q. Do you know if Lehman Brothers acquired the one-page loan document?

A. As I believe you asked me that before and it is still the same answer, Masood Bhatti represented to me clearly that they were going to pay off Ken Jowdy's loans to our Hawaiian investors at the close of Cabo deal by collateralizing his equity.

I can only imagine that Masood Bhatti didn't just take Ken Jowdy on his word, that there was \$7 million plus or minus due to Hawaiian people at that time, that he had asked for backup. I did not deliver backup to Masood Bhatti, but I can only imagine Lehman Brothers wasn't going to cut a blank \$7 million check or represent to me that they were going to do that.

Q. Did they, in fact, give you \$7 million at the closing?

A. At the close of Cabo?

Q. Yes.

A. Absolutely not.

Q. Did you ever get that \$7 million?

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2 A. No. It is part of the outstanding money
3 that we sued for in Arizona and we are still pursuing
4 in Mexico.

5 Q. Was that lawsuit that was withdrawn or
6 however disposed of in Arizona, ever refiled in the
7 United States?

8 A. It was not. It is being pursued in
9 Mexico.

10 Q. Did you ever sue Masood Bhatti for the
11 \$7 million or Lehman Brothers?

12 (Witness and counsel confer.)

13 A. We have not to this date sued Masood
14 Bhatti or Lehman Brothers.

15 Q. Are you planning to sue Masood Bhatti or
16 Lehman Brothers on behalf of Little Isle or yourself?

17 MR. STOLPER: It is something he is
18 considering but doesn't want get into details.

19 Q. I don't want to ask any attorney-client
20 privilege.

21 The question is: Are you considering
22 that?

23 MR. STOLPER: You can say yes without
24 waiving privilege.

25 A. I am considering all remedies to still

0623
1 retrieve the funds that were lent to Ken Jowdy,
2 including continuing the federal arrest warrant
3 prosecution of him in Mexico and the million dollar
4 bench trial in Nevada and the \$11 million judgment in
5 Mexico.

6 Q. Did any of your clients ever invest in
7 any Avalon entity, to your knowledge?

8 A. Yes.

9 Q. What was that what the name of the
10 entity?

11 A. I don't recall the specific name, but
12 the airplane hangars and original land that is
13 underneath it, Tommy Constantine always referred to
14 as Avalon.

15 Q. Were you in any way a managing member or
16 involved in the property as an owner or a principal?

17 A. I believe at one point I was supposed to
18 be and I believe I was unable to come up with the
19 capital at the time to invest in it.

20 Q. Were you ever a principal or managing
21 member of any of those entities or otherwise
22 employed?

23 A. I don't think so.

24 Q. How many of your clients were involved
25 in Avalon?

0624
1 A. There were three investors.

2 Q. Do you know who they were?

3 A. Yes. Joe Juneau, Jozef Stumbe1 and Owen
4 Nolan.

5 Q. Did they make any money on that
6 investment or did they lose their principal?

7 A. The buildings are still there. I
8 believe Joe Juneau requested his funds back and was
9 paid back. I believe Owen Nolan was offered his
10 money back and refused to take it back. And Jozef
11 Stumbe1 is still an ongoing partner in that project.

12 Q. So you never made an investment in that?

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13 A. I don't believe I did.
14 Q. Did you ever discuss an investment
15 opportunity in any of the Avalon entities with those
16 three clients of yours?
17 A. I believe I talked about all the details
18 of that land and holdings in that project.
19 Q. What did you say to them about those
20 projects and when?
21 A. I don't recall.
22 Q. Do you know when it was?
23 A. I do not.
24 Q. Was it in 2000?
25 A. The best I can guess, so we don't have

0625
1 to go down numbers game again, is it was somewhere
2 between 2003 and 2005.
3 Q. Were you compensated in any way by
4 Avalon?
5 A. I was not. In fact, they still owe me
6 money.
7 Q. For what?
8 A. For expenses I laid out to assist in
9 project development.
10 Q. Were you supposed to be compensated by
11 Avalon in any way?
12 A. No.
13 Q. Can you tell me about the expenses that
14 you laid out?
15 A. It was approximately \$20,000 that they
16 needed for permits for electricity hookups, and they
17 were being pressured by the builder so I lent the
18 project the money.
19 Q. And where did you get the money to lend
20 to the project?
21 A. Income and savings.
22 Q. And that money didn't come from any
23 Little Isle IV account?
24 A. Income and savings.
25 Q. So there will be no transfers in Little

0626
1 Isle IV bank account records to any Avalon entity or
2 anyone affiliated with any Avalon entity concerning
3 that \$20,000; is that right?
4 A. That's correct.
5 Q. And you weren't paid in any way for any
6 type of solicitation or any type of effort to raise
7 money on behalf of Avalon?
8 A. I was not.
9 Q. What is Tech Connect?
10 A. It is a bankrupt education company.
11 Q. When you say "education company," what
12 are you referring to?
13 A. I believe they provided back-end
14 hardware solutions, software solutions to K through
15 12 schools.
16 Q. When you say "bankrupt," how do you know
17 it is bankrupt?
18 A. I saw bankruptcy papers.
19 Q. Were any of your clients invested in
20 Tech Connect?
21 A. Yes.
22 Q. Who was invested i Tech Connect?
23 A. I don't recall.

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24 Q. More than ten of your clients?

25 A. I don't recall.

0627

1 Q. Do you know how they came to become
2 investors in Tech Connect?

3 A. I don't recall.

4 Q. Did you have discussions with them prior
5 to them making an investment in Tech Connect?

6 A. In many of their investor meetings with
7 the CEO of the company, I sat in on the meetings.

8 Q. Did you have any conversations with any
9 of your clients about an investment opportunity in
10 Tech Connect prior to them making an investment?

11 A. I believe I had many conversations with
12 them, but as a result of them having a face-to-face
13 meeting with the CEO of the company.

14 Q. What did you say to them about their
15 opportunity to invest in Tech Connect prior to them
16 making their investment?

17 A. I don't recall.

18 Q. Do you know when this was?

19 A. Prior to 2006.

20 Q. Were you also an investor or shareholder
21 or member of Tech Connect?

22 A. I was not.

23 Q. Were you compensated in any way, gifts
24 or otherwise, for soliciting investments in Tech
25 Connect?

0628

1 A. I was not.

2 Q. Generally, I may have asked this, do you
3 know how many of your clients invested in Tech
4 Connect?

5 A. I don't recall.

6 Q. More than ten?

7 A. I really don't recall.

8 Q. Do you think all of your clients, maybe
9 20 clients, invested in Tech Connect?

10 A. No.

11 Q. Do you think it was more than five?

12 A. I don't recall.

13 Q. Do you have their documents or any
14 documents concerning Tech Connect?

15 A. I don't believe I do.

16 Q. Did any documents come through you
17 concerning Tech Connect which you provided to your
18 clients?

19 A. When their signed subscription
20 agreements were forwarded back, they were sent to me
21 but they were also part of that subsequent theft in
22 2007.

23 Q. Who do you suspect committed that theft?

24 A. Christine Myrick.

25 Q. Did you ever confront her with that?

0629

1 A. It was confronted many times during
2 deposition. And both herself and Michael Meeks,
3 attorney Meeks, said they possessed all the documents
4 that came out of my office but they refused to turn
5 them over.

6 Q. Tech Connect is bankrupt; correct?

7 A. I believe they filed bankruptcy.

8 Q. Do you know how much your clients

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generally invested in Tech Connect, did they invest \$10,000, \$100,000, \$500,000 each?

A. I don't recall.

Q. Do you know if it was more than a million dollars each?

A. I don't believe so.

Q. Do you have any documents in your possession that would enable you to determine which one of your clients invested in Tech Connect?

A. I don't believe so.

Q. And sitting here today, you don't remember what you specifically said or generally said to your clients about Tech Connect prior to them making an investment in Tech Connect?

A. I do not.

Q. Do you know if you ever reviewed any of Tech Connect's operating agreements or financials

prior to your clients making an investment in Tech Connect?

A. I recall reviewing ongoing documents from Tech Connect and at perhaps reading the offering agreements, subscription agreements and offering memorandums.

Q. But you don't have those documents now?

A. No, I don't.

Q. Do you know if Tech Connect had audited financials or not?

A. I believe they did.

Q. Do you remember seeing them?

A. I believe I did.

MR. STOLPER: Chris, Tech Connect came up in background with him the first time around. I don't understand, you are now doing a line of questioning as if it had something to do with Diamante del Mar or --

MR. CASTANO: SEC subpoenas and SEC investigations are kind of broad, and we are allowed to ask various questions. This is within the scope of a certain subpoena enforcement action --

MR. STOLPER: So you are saying this falls under the order directing private investigations and designating officers to take

testimony?

MR. CASTANO: I believe certainly the formal order is broad enough to encompass asking questions of Phil Kenner and various entities he is affiliated with.

If you have an objection, I have no problem going back and getting a new subpoena entitled with different entities and bringing Mr. Kenner back to ask the same questions, but I believe the formal order is certainly broad enough for us to ask these questions. They are the same investors.

MR. STEPANIUK: I bet I can find some language in here.

MR. STOLPER: Just asking. I will state my objection. You keep going.

MR. CASTANO: Okay.

Q. Ecser Holding Corporation; do you know what that is?

A. Yes.

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20 Q. What is it?
21 A. It is a company that I believe has a
22 commercial patent on rubber recycling.
23 Q. Do you know if it is an ongoing entity
24 or a bankruptcy?
25 A. I believe it is an ongoing entity.
0632
1 Q. Do you know if any of your clients
2 invested in it?
3 A. Yes.
4 Q. How many of your clients?
5 A. I don't recall.
6 Q. Do you know if your clients had any
7 conversations with you about Ecser Corporation before
8 investing in it?
9 A. I believe all of them did.
10 Q. Do you know how many of your clients?
11 A. I don't recall.
12 Q. More than ten?
13 A. I don't believe so.
14 Q. Do you know what you said to your
15 clients prior to them making an investment in Ecser
16 Holding Corporation?
17 A. All I can imagine is I clarified
18 information they received from the CEO of Ecser.
19 Q. How do you pronounce it?
20 A. Ecser, E-C-S-E-R.
21 Q. Were you in any way an investor or
22 member of Ecser Holding Corporation?
23 A. I was not.
24 Q. Were you employed in any way or
25 affiliated as a consultant at Ecser Holding
0633
1 Corporation?
2 A. I was not.
3 Q. Were you compensated in any way by Ecser
4 Holding Corporation?
5 A. I was not.
6 Q. Did you review whatever offering
7 materials Ecser Corporation provided to your clients?
8 A. I am sure I saw all of the agreements.
9 Q. When was this approximately?
10 A. Between 2003 and 2006.
11 Q. Do you know if any of your clients made
12 money on Ecser Corporation?
13 A. I don't know.
14 Q. Have you asked any of your clients if
15 they made money on Ecser Corporation?
16 A. I have not recently.
17 Q. What is Arizona Airpark LLC?
18 A. I think that was an entity related to
19 Avalon that I don't believe has any -- was never
20 established.
21 Q. Do you know if any of your clients
22 invested in Arizona Airpark LLC?
23 A. I don't think it is a real entity.
24 Q. What is Integrated Telecommunications?
25 A. It's a telecom corporation.
0634
1 Q. Do you know if any of your clients
2 invested in Integrated Telecommunications?
3 A. Yes, they did.
4 Q. Do you know how many of your clients

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invested in Integrated Telecommunications?

A. I do not.

Q. More than ten?

A. I don't believe so.

Q. Do you recall having conversations with any of your clients about an investment opportunity in Integrated Telecommunications prior to your clients making an investment?

A. Yes.

Q. Do you know what you discussed?

A. I am sure I clarified conversations they had with the president of Integrated Telecommunications prior to them making their initial investments.

Q. When you say "clarify," what do you mean?

A. Typically, again, my role as a business manager, was to take and participate in conversations between my clients and other outside individuals they were considering investing or getting in business with. And after those meetings, clients would ask me

what did they really say, can you explain what they meant by something.

That was my role that I played with each of the clients.

Q. Was Integrated Telecommunications a start-up, meaning was there a private placement or subscription agreement?

A. I believe so.

Q. Did you review those with your clients?

A. I believe I did.

Q. I'm sorry if I asked this, I am getting confused.

Were you an investor in Integrated Telecommunications?

A. I was not.

Q. Were you compensated in any way by Integrated Telecommunications for anything?

A. I was not.

Q. The entities that I have just mentioned, there are a few and we can go through them again; do you know if Tommy Constantine is in any way affiliated with these entities?

A. I believe the only one you mentioned was Avalon.

Q. He was affiliated with Avalon?

A. It was originally his land.

Q. Is Integrated Telecommunications an ongoing concern?

A. An ongoing?

Q. Is it a business that is still operating?

A. Yes, I believe it is.

Q. Do you know if any your clients made money on Integrated Telecommunications?

A. I believe they have.

Q. How do you know that?

A. Because I recall depositing checks from Integrated Telecommunications into their respective accounts.

Q. Checks bigger than the principal that

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16 they invested?

17 A. I don't recall.

18 Q. Do you have any documents that would
19 indicate that?

20 A. I do not.

21 Q. Code Fire Acquisition Corp.; what's
22 that?

23 A. It was a video game company.

24 Q. Were you affiliated with that company in
25 any way?

0637
1 A. I did a lot of work for that company
2 after some my clients started to invest.

3 Q. When you say "did a lot work," did you
4 have a position? Were you an employee, a consultant?

5 A. I was a consultant.

6 Q. Were you compensated?

7 A. I believe I was compensated.

8 Q. Do you know what the terms of your
9 compensation were?

10 A. By introducing the gaming company to
11 high profile athletes, I was compensated with shares
12 of the company or options in the company.

13 Q. And did you introduce it just to your
14 clients or to other professional athletes?

15 A. I discussed Code Fire Acquisition with
16 many people in the sports industry, some of which
17 were my clients.

18 Q. You were compensated with shares you
19 said?

20 A. Options, I believe.

21 Q. When was this approximately that you
22 became involved as a consultant for Code Fire?

23 A. Between 2002 to 2004.

24 Q. Is Code Fire Acquisition Corp. an entity
25 that is continuing in business?

0638
1 A. I believe it's a successor company. It
2 has filed bankruptcy.

3 Q. Do you know how much you were -- excuse
4 me.

5 Besides the options or shares, did you
6 receive any other compensation?

7 A. I did not.

8 Q. Do you know how many of your clients
9 invested in Code Fire?

10 A. I do not.

11 Q. More than ten?

12 A. I don't recall.

13 Q. Do you recall how much they might have
14 invested?

15 A. I do not recall.

16 Q. 100,000, 500,000? Do you remember if it
17 was big investments or smaller investments? Big and
18 small being relative, I am sure.

19 A. I believe smaller investments relatively
20 speaking.

21 Q. Did you review offering documents with
22 your clients for Code Fire?

23 A. Yes, I did.

24 Q. Was that prior to them making an
25 investment?

0639

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1 A. Typically, yes.
2 Q. Now did you disclose to your clients
3 that you were receiving options for being involved
4 with Code Fire?
5 A. For bringing deals to the table, such as
6 Phil Nicholson, I brought to develop a game at the
7 company. Buddy Rice, who was the Indy 500 winner at
8 the time. Both were related to my client base.
9 I also brought an endorsement deal to
10 Owen Nolan at the time. I also received compensation
11 for a portion of that.
12 Q. My question was: Did you disclose to
13 your clients that you had received compensation from
14 Code Fire in the form of options prior to them making
15 an investment in Code Fire?
16 A. No, because all of the consulting was
17 done after they had become investors. The company
18 asked me to introduce them to all the high profile
19 athletes and entertainers I knew.
20 Q. After they became investors, did you
21 then disclose to them upon entering into a consulting
22 arrangement with Code Fire Acquisition Corp. that you
23 would now be receiving compensation from the company?
24 A. For the endorsement deals, yes.
25 Q. And was there a written consulting
0640 agreement with Code Fire and yourself?
1 A. I believe there was.
2 Q. Do you have that written agreement?
3 A. If I have it, it would have been
4 forwarded to you guys. I don't recall that
5 specifically in the production though.
6 Q. Do you know if any your clients made
7 money with Code Fire Acquisition Corp.?
8 A. I don't think so.
9 Q. What is Impact Protective Equipment?
10 A. And if I may just say, at the end of
11 Code Fire Acquisition Corp.'s existence, I signed a
12 guarantee for the company that I am now stuck with.
13 Q. What was that about?
14 A. It was a \$2 million guarantee for the
15 company, and the company went bankrupt. The bank has
16 now pursued me for repayments.
17 Q. What was the guarantee for?
18 A. Operating capital to keep the company
19 alive.
20 Q. Did you lend money to them or you just
21 signed a guarantee?
22 A. I just signed a guarantee.
23 Q. Did you receive anything back in
24 exchange for that?
25
0641 A. I believe I received about \$5,000 that I
1 had to use for legal fees to review the documents,
2 and I believe I was supposed receive compensation of
3 shares. That didn't play out because the option
4 terms were never reached.
5 Q. This was all in 2004?
6 A. This was probably after 2006.
7 Q. What is Impact Protective Equipment?
8 A. It was a shoulder pad, football shoulder
9 pad company.
10 Q. Did any of your invest in Impact
11

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12 Protective Equipment?

13 A. Yes.

14 Q. Do you know how many clients?

15 A. I do not recall.

16 Q. Were you investor in Impact Protective
17 Equipment?

18 A. I was not.

19 Q. Were you in any way affiliated with
20 Impact Protective Equipment?

21 A. I was not.

22 Q. Do you know when your clients invested
23 in Impact Protective Equipment approximately?

24 A. Between 2003 and 2005.

25 They asked me to participate on the

0642
1 board, but I refused.

2 Q. Is Impact Protective Equipment a
3 business that is still continuing?

4 A. I believe they just filed for bankruptcy
5 last year.

6 Q. Do you know if any of your clients made
7 money on Impact Protective Equipment?

8 A. I believe they did not.

9 Q. Prior to your clients making an
10 investment in Impact Protective Equipment, do you
11 recall if you had any conversations with them about
12 their investment opportunity in Impact Protective
13 Equipment?

14 A. Again, in the same context of all the
15 other ones that you have asked and may still ask, I
16 would speak to them to clarify what they had heard
17 from the presidents of the company, respective
18 companies.

19 Q. Did you also review subscription
20 agreements or offering materials they might have
21 received?

22 A. Yes, I did.

23 Q. Do you know approximately how many
24 clients invested in Impact Protective Equipment?

25 A. I do not recall.

0643
1 Q. Do you know what Technic Digital Arts
2 is?

3 A. That was the successor company to Code
4 Fire. Same answers.

5 Q. What is Escher -- it is similar to one
6 company we said and might be the same, Escher
7 Holdings, E-S-C-H-E-R, Holdings; is that similar to
8 the other holding company?

9 A. I don't recognize that name but it must
10 be.

11 Q. Do you know if there was a car recycling
12 business that your clients might have invested in, a
13 car tire recycling business?

14 A. That is Ecser. That's the rubber
15 recycling company.

16 Q. That's the entity we spoke about
17 earlier?

18 A. Ecser, yes.

19 MR. CASTANO: Why don't we go off the
20 record at 4:24 p.m.

21 (Recess taken.)

22 MR. CASTANO: We are back on the record
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23 at 4:40 p.m..

24 Q. Mr. Kenner, while we were off the
25 record, were there any conversations between the

0644 1 Commission staff and yourself?

2 A. None at all.

3 Q. Mr. Kenner, I went through a bunch of
4 entities before we went off the record, including
5 Technic Digital Arts, and what have you. I can go
6 through each one again, but are you aware of any
7 fraud litigations concerning these entities, meaning
8 the entities didn't use the monies they received for
9 the purposes for which they were supposed to use the
10 monies?

11 MR. STEPANIUK: Do you mean fraud or
12 litigation or fraud litigation?

13 Q. We can do two questions; it was a
14 compound question.

15 Are you aware of any litigations
16 involving these entities, besides the Nolan
17 arbitration?

18 MR. STEPANIUK: And other than
19 bankruptcy proceedings.

20 A. Are you referring to past or current?

21 Q. Past or current litigations involving
22 any of these entities, besides bankruptcy and besides
23 the allegations made by Owen Nolan in the
24 arbitration.

25 A. There is litigation regarding Eufora,

0645 1 which you didn't mention earlier. There is
2 litigation in Mexico current regarding Diamante Cabo
3 San Lucas and Ken Jowdy. And in the past there was
4 litigation in California regarding Ken Jowdy and
5 Diamante del Mar as defendants. Also in California,
6 Ken Jowdy and Diamante Cabo San Lucas as defendants.

7 Q. Mr. Kenner, I apologize. What I am
8 talking about are the entities that we just went
9 through: Code Fire, Integrated, Ecser, Technic,
10 Impact Protective Equipment, Avalon.

11 Are you aware of any litigations
12 involving these entities, from 2003 to present,
13 besides bankruptcies or allegations Mr. Nolan made
14 against you in an arbitration?

15 A. No. Other than they were some of the
16 same list as the Nolan arbitration. And the
17 identical list was also listed in the Juneau and the
18 Moreau litigation.

19 Q. The Juneau and Moreau litigation against
20 you?

21 A. That's correct.

22 Q. Do you know if Juneau or Moreau alleged
23 that they were unaware of Little Isle IV monies being
24 used as loans to other entities?

25 A. I don't know.

0646 1 Q. Are you aware of or involved in --
2 withdraw that question.

3 Have you been involved in any
4 conversations with your clients concerning any
5 securities, broadly defined, in the last three years?

6 A. I apologize but I am not sure I
7 understand the total scope of the question.

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Q. Let me rephrase.

In the last three years, have any of your clients had any conversations with you whatsoever concerning an offering of any type of securities?

A. I don't think so.

Q. To your knowledge, have any of your clients invested in any securities that weren't publicly traded in the last three years?

A. Not that I am aware of.

Q. We've discussed a number of entities including entities that are Diamante del Mar entities, Little Isle IV entities, plus all of these entities.

Has that slowed down, meaning you not having conversations with your clients about investing in start-up companies?

And "start-up" and "slow down" may be

the wrong phrase, but it seems like there are certainly a number of entities that your clients invested in that were start-ups. I think your testimony now is that in the last three years you haven't had any conversations about that, nor do you know if they have invested in those type of entities.

Is there a reason for that?

A. The primary and sole reason is for the last three years I have been inundated on the offensive as a plaintiff or representative of plaintiffs in litigation in the United States and Mexico in multiple jurisdictions going after Ken Jowdy for his numerous frauds that are well documented and Tommy Constantine and his numerous frauds that are well documented. And that has engulfed 95 percent of my work efforts over the last three years.

Q. How are you currently making money, if at all?

A. Still as an adviser to some of the clients.

Q. How much are you compensated for your advisory services currently?

A. I am not sure I understand.

Q. How much do your clients compensate you for your investment advisory services?

A. It varies based on prearranged agreements with each one of them.

Q. How much did you your clients compensate you last year approximately?

A. Between 125 and \$150,000.

Q. How many clients do you currently have?

A. Between 15 and 20.

Q. Are you compensated in any other way?

A. Not in the last few years.

BY MR. STEPANIUK:

Q. I understood your prior answer when you referred to it varies to refer to the amount of compensation for particular clients.

But putting aside the amount and what that turned out to be, can you describe what the nature of the compensation arrangements is? I know you probably went into it last time you were here. I

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19 apologize, I wasn't here and it is an important point
20 and I want make sure I understand it.

21 A. I have acted for last two decades
22 primarily as a business manager handling day-to-day
23 business affairs, whatever that may be, for my
24 clients and their family. It may range from
25 establishing bank accounts or helping them set up

0649 1 investment accounts, to assistance in buying and
2 selling homes, setting up life insurance plans,
3 reviewing outside private equity deals that they
4 bring to the table, to booking family vacations, to
5 finding dogs or automobiles that they want to give to
6 their reciprocating spouse as gifts, to dealing with
7 credit issues, et cetera.

8 I am effectively considered a third
9 adult member of their family and help with their
10 decision, and they rely on me for that.

11 Q. And what is the structure of the
12 compensation arrangements that you have with clients
13 for those services?

14 A. Over the last few years, it has really
15 been just an agreed upon number.

16 Q. You mean a flat fee?

17 A. A flat fee.

18 Q. Is that the case with respect to every
19 client, it has been a flat fee over the last few
20 years?

21 A. Plus or minus. It's a flat fee or a
22 general range.

23 Q. Was there a different arrangement that
24 you had in prior years with clients as far as
25 compensation received and how it was calculated?

0650 1 A. In 2003, when I left Assante Global
2 Advisors in California and had to sue them for a
3 bunch of security issues, they settled with me out of
4 court to avoid your involvement and interaction in
5 all of their wrongdoings and scams, my initial
6 advisory fee was .5 percent of the agreed-upon assets
7 I would oversee on behalf of the family.

8 And the scope of those agreed-upon
9 assets would be negotiated client by client. It may
10 be overseeing their checking accounts, their
11 investment accounts. It may be overseeing equity
12 balances in their homes.

13 Q. Whatever the assets under management
14 were?

15 A. Whatever assets they wanted me look at.
16 If they didn't want me to pay attention to their
17 homes, their mortgages, it would excluded. If they
18 wanted me involved in the debt analysis of the home,
19 ongoing pay down structure, whatever those assets
20 were, fell under the scope of that half of a point
21 annual fee.

22 Q. So it was annual?

23 A. Annual, and it capped out at 50,000 per
24 client.

25 Q. At what point during the year was the
0651 1 value of the agreed-upon assets you managed?

2 A. Quarterly.

3 Q. When did that compensation arrangement

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4 change?

5 A. In and around 2008, when I didn't really
6 change my dynamic role, not only to just help with
7 their family affairs but, really, to become a
8 litigation manager, going after all the people.

9 Q. Part of what you refer to you spent the
10 last three years doing?

11 A. Yes.

12 Q. How about your advice with respect to
13 any other role you had with respect to investments
14 such as the ones you talked about more recently,
15 Technic, Avalon, but also including Diamante del Mar,
16 Little Isle, the video game venture, Digital Arts,
17 was that included in the five percent agreed-upon
18 assets or was that separate?

19 A. I appreciate your confidence, but it was
20 .5 percent.

21 Q. Did I say five percent?

22 A. Yes. I appreciate that. I didn't have
23 the balls to try that one.

24 Q. In case the IRS reads this also.

25 A. The assets we would agree upon would be

0652 1 same as if, let's say \$100,000 stayed in a checking
2 account or went to their institutional investment
3 account, paid down 100 grand on their home debt or
4 went to a private equity investment. If it was
5 included in the bucket of assets to review, it was
6 not relevant to me.

7 Q. So whether you advise them to invest in
8 this company or to do something else with the money,
9 it didn't matter, you got compensated for advising
10 them with respect to the use of that particular
11 assets?

12 A. Where that \$100 went was not relevant.

13 Q. You got .5 percent of it each year,
14 whatever you advised them to do with it at the end of
15 day?

16 A. Correct.

17 Q. Anything else about the compensation
18 arrangement with the folks we have been referring to
19 all day as your clients that we haven't covered?

20 A. The only other incremental arrangements
21 that were made, that we talked about on the last
22 visit with you guys, had to do with managing member
23 compensation in Hawaii after the joint venture, which
24 was \$100,000 a year payable from our side of the
25 joint venture and I believe I suspended that

0653 1 approximately 9 to 12 months into the compensation
2 because Alan Warden and Lehman Brothers were screwing
3 us out of that entire deal we did.

4 And at Diamante del Mar, starting in '03
5 or '04, and it was disclosed in the offering
6 agreement, this was a consulting arrangement with one
7 of my LLCs at the time to compensate I believe total
8 compensation, it was supposed to be I believe 240,000
9 a year, 20,000 a month, but I believe after
10 approximately four payments or so, I also suspended
11 that when Jowdy was unable to bring in extra
12 financing.

13 About a third of that was actually paid
14 back out to Christine Myrick for covering more of my

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day-to-day business management business, so she received additional compensation as a result of that back in those days.

Then in 2006, when we closed Cabo San Lucas deal, I began to receive as a sales consultant \$10,000 a month to head up the sales team trying to sell real estate in Cabo San Lucas on the project site. And that continued for approximately 18 months until I challenged Ken Jowdy and his frauds with respect to the corporation, and he terminated myself and the entire sales program.

Q. And correct me if I am wrong, the compensation you received from Little Isle, Diamante del Mar and Cabo San Lucas, that was indirectly paid by your clients to the extent they were investors in the entities?

A. Indirectly, that would be true.

Q. And that would be compensation directly came from the entities themselves, the LLCs?

A. That's correct.

Q. Did you negotiate any employment contracts for any of your clients?

A. No, I did not act as their agent. I did review and alter some of them as a result of negotiations that went on, but I was brought in as a consultant by the player, but I was not the agent.

Q. Did you negotiate any sponsorship or endorsement contracts for any of your clients?

A. Yes, I did.

Q. You mentioned one with a game company --

A. Yes.

Q. -- with respect to Nolan.

Did you do others?

A. I believe with Tech Connect there were shares or options granted to my clients for doing some marketing efforts. I negotiated a number of

endorsement deals for Owen Nolan for some merchandise memorabilia corporations, for some equipment manufacturers. I set up number of appearances for different clients, including Owen Nolan, to be paid compensation for appearances.

I can't recall what else off the top of my head.

Q. Were you separately compensated by Nolan and the others you just mentioned in the last answer for those services?

A. No, I was not.

Q. Were you compensated at all?

A. I was not, other than the ones we talked about earlier.

Q. Were those services with respect to endorsement deals, memorabilia, and the like, were they included in the .5 percent of the agreed-upon assets?

A. I guess in the event that Nolan made a quarter million dollars and deposited 150,000 after tax, and it became one of his assets, yes.

Q. Otherwise, you did not receive compensation?

A. No, it was part of my general business services.

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1 BY MR. CASTANO:

2 Q. We talked about this last time, just
3 briefly the Nolan arbitration award, have you in any
4 way paid any of that?

5 A. I have not.

6 Q. Is there any ongoing litigation about
7 you paying, to your knowledge?

8 A. There is not.

9 Q. Has he taken any steps to enforce that
10 arbitration award?

11 A. He has not.

12 Q. Have you heard anything about him taking
13 steps to enforce the arbitration award and collect?

14 A. I have not.

15 Q. Have you filed bankruptcy at any time?

16 A. I have not.

17 MR. CASTANO: I want to mark this as
18 Diamante Exhibit 40.

(NY-8125 Exhibit Number 40 was
so marked for identification.)

19 Q. I am showing you, Mr. Kenner, what has
20 been marked Diamante Exhibit 40.

21 Please take a moment to review that.

22 (Witness complies.)

23 MR. STOLPER: Chris, our copy has an

0657

1 underscore on it. Did you give us the wrong one?

2 MR. STEPANIUK: Here is a clean one.

3 MR. STOLPER: Should he read the whole
4 thing?

5 MR. CASTANO: He doesn't have to. He
6 should take his time to review it, of course.

7 Q. Mr. Kenner, have you seen Diamante
8 Exhibit 40 before?

9 A. Yes, I have.

10 Q. What is Diamante Exhibit 40?

11 A. An affidavit signed by Sergei Gonchar
12 specifically for the arbitration hearing in Arizona
13 with Nolan.

14 Q. Who wrote, to your knowledge, Diamante
15 Exhibit 40?

16 A. I believe it was a combination of myself
17 and one of my attorneys.

18 Q. I don't want to get into any
19 conversations you had with your attorney.

20 Do you know why you wrote this
21 declaration?

22 A. Yes, because --

23 Q. In part, sorry.

24 A. In part, because Sergei Gonchar was
25 unable to travel to Arizona at the time of the

0658

1 hearing.

2 Q. Sergei Gonchar is one of your clients;
3 is that right?

4 A. Yes.

5 Q. And do you know where he is from
6 originally?

7 A. St. Petersburg, Russia.

8 Q. Do you know when he got to the United
9 states?

10 A. In the mid '90s.

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Q. Do you know if Mr. Gonchar took English classes while he was in Russia or did he come here and not speak the language?

A. I believe he spoke decent English when he got here.

Q. Are sure about that?

A. Yes. When I met him in the mid '90s, his English was good enough for he and I to communicate one on one.

Q. Do you know if he can read English?

A. I don't know if he can read English but his English skills are very significant compared to most of the other foreign players I've dealt with over the years.

Q. Have you ever asked him if he could read English?

A. I have not, nor have I asked Owen Nolan if he could read English.

Q. Is Owen Nolan from the United States?

A. He was born in Belfast, Ireland, grew up in Toronto and has one language, English. But after arbitration, I still don't know to this day if Owen Nolan can read.

Q. Do you know sitting here today -- withdrawn.

Would you be surprised to learn that Mr. Gonchar can't read English?

A. I would be shocked that he couldn't read.

Q. Do you think he could read every single word in this affidavit?

A. That I can't speak to, but I know he is a very sophisticated individual who, at almost all of our face-to-face meetings, would carry a dictionary with him and a paper to write down words that he wasn't familiar with, and we would spend a lot of time defining words.

Q. When is the last time you spoke to Mr. Gonchar?

A. My last correspondence with him was in the last few weeks.

Q. How often do you speak to him over the last year, let's say?

A. On average, about once a month I believe I communicated with him.

Q. Do you know if you had any communications with Mr. Gonchar about any investigation by any civil or criminal agency concerning Diamante and any of the entities you are affiliated with?

MR. STOLPER: Is there a time frame on that?

MR. CASTANO: Over the last two years.

A. I don't recall. I am aware he was subpoenaed to come to New York to testify, I believe in Ken Jowdy's grand jury investigation.

Other than that, I don't believe we've had many or any conversations about ongoing investigations.

Q. Did Mr. Gonchar in any way tell you anything about being subpoenaed to appear in a Ken

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22 Jowdy or Philip Kenner subpoena investigation by some
23 entity?

24 A. He told me that he was subpoenaed to go
25 to New York.

0661

1 Q. Did he say anything else?

2 A. Just that he was subpoenaed to go to New
3 York.

4 Q. Did you have any substantive
5 conversations with him about what the contents of
6 that conversation might be?

7 A. No, because I was still, as I am as I
8 sit here today, unaware of what the contents would
9 be.

10 Q. You didn't have any conversations with
11 him whatsoever about his subpoena to New York other
12 than he said to you, "I was subpoenaed." And you
13 said, "Okay," and there was no further conversations.

14 A. I don't believe so.

15 Q. Were there other affidavits in the Nolan
16 arbitration that you drafted?

17 A. There were a number that I turned over
18 to you.

19 Q. The question is: Were there any other
20 affidavits in the Nolan arbitration which you drafted
21 in part in conjunction with your attorney?

22 A. Yes.

23 Q. Do you know how many there were?

24 A. I do not.

25 Q. Do you know if there more than ten?

0662

1 A. I do not. But I recall turning them all
2 over as a result of that Dan Boyle action we talked
3 about earlier.

4 BY MR. SMITH:

5 Q. Do you know how Mr. Gonchar received the
6 draft of the affidavit that you and your attorney
7 drafted?

8 A. I would assume by fax.

9 Q. Did you send it to him?

10 A. I don't recall.

11 Q. Do you know whether he reviewed the
12 affidavit before signing it?

13 A. I would assume he did.

14 Q. Did you have any conversation with him
15 about it?

16 A. I asked him if he had any questions, if
17 anything seemed inaccurate would he express it to me.
18 He said yes. That's all I am aware of.

19 Q. I'm sorry, subsequent to his receiving
20 the draft affidavit and before signing it, you had a
21 conversation with him about the affidavit?

22 A. That I don't know.

23 After he received it by fax, I had a
24 conversation with him to see if all of the facts in
25 the affidavit were accurate. And to the best of his

0663

1 knowledge, he said they were and he faxed it back to
2 me.

3 I don't know when he signed it.

4 Q. But when he faxed it back to you it was
5 a signed version that he faxed back to you?

6 A. Yes.

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7 Q. Did he make any changes to the draft
8 that he had received?

9 A. I don't recall.

10 Q. You don't recall any changes being made
11 by him?

12 A. I don't recall any changes that were
13 made by him.

14 Q. You mentioned one conversation.

15 Did you have any other conversation with
16 him before receiving the signed affidavit back from
17 him?

18 MR. STOLPER: About the affidavit?

19 Q. About the affidavit.

20 A. No. I believe it all happened within 24
21 hours and I believe it happened during the
22 arbitration.

23 BY MR. STEPANIUK:

24 Q. What was the source of the facts
25 asserted in the affidavit you and your attorney

0664 drafted?

1 A. The truth.

2 Q. I meant more where were the facts and
3 information obtained from. I hear you are saying you
4 believe the facts to be true, but what was the source
5 of the information?
6

7 A. Again, as I read this now four years
8 later, as I skimmed through it, I believe all of the
9 information was a direct reflection of information
10 that Sergei and I had discussed over years and years
11 of being in business, manager and client. This was a
12 very specific affidavit responding to allegations by
13 attorney Meeks and Owen Nolan.

14 Q. So it was based on your own recollection
15 of the events and circumstances and conversations at
16 issue?

17 A. Both mine and Sergei Gonchar.

18 Q. Did you talk to Sergei Gonchar before
19 preparing the affidavit?

20 A. I asked him if I prepared a statement of
21 facts based on our conversations in the past if he
22 would be willing to sign the affidavit since he could
23 not appear for trial.

24 He said he would have no problem. I
25 prepared it with my attorney at the time, faxed it to

0665 1 him. We had a conversation, I wanted to make sure it
2 was very clear what was written, no
3 misrepresentations to be misunderstood in the future.
4 He read it, said he was very clear, had no specific
5 questions. I received a fax copy back.

6 Q. Is what you just described the full
7 extent of your communications with Mr. Gonchar
8 concerning this affidavit?

9 A. To the best of my recollection.

10 BY MR. CASTANO:

11 Q. Have you acquired any new clients in the
12 last three years?

13 A. No.

14 Q. The Nolan arbitration award, did you
15 disclose that to your clients?

16 A. Every one of them.

17 Q. Have you disclosed all the lawsuits that

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18 you are involved in to your clients?
19 A. Every one of them.
20 Q. How did you disclose it to them?
21 A. In phone or in person. I told everyone
22 about every lawsuit out there.
23 Q. Did you ever notify clients in writing
24 about the lawsuits?
25 A. No.

0666

1 MR. STEPANIUK: Let's go off the record
2 for one second.
3 (Recess taken.)

4 BY MR. CASTANO:

5 Q. We should be wrapping up shortly, I
6 appreciate your patience, but before we go off the
7 record, have you discussed the SEC investigation with
8 any of your clients?

9 A. They are all aware I have made several
10 trips to New York.

11 Q. What have you informed your clients, if
12 anything, about the SEC's investigation?

13 A. That I have made several trips to New
14 York.

15 Q. That's what you said to them?

16 A. Yes.

17 Q. Did you say you made several trips to
18 New York to go to the SEC or did you say I made
19 several trips to New York because I am being
20 investigated by someone?

21 A. To the best of my recollection, I have
22 told them I am going back to New York for some
23 additional interviews. I don't recall if I told them
24 who specifically I was meeting with or not, but I
25 have represented that, as I have pretty much about

0667

1 everything that has gone on in the last two decades,
2 that I am here.

3 Q. Have you specifically told your clients
4 that you are being investigated by the Securities and
5 Exchange Commission?

6 A. No, because I have continued to show up
7 here to interview and help with information
8 gathering.

9 Q. Do you think it is information that your
10 clients would want to know especially as an
11 investment adviser?

12 A. In what context?

13 Q. I am just asking you. It is a question
14 to you: Do you think your clients would want to know
15 that the SEC is bringing you in for testimony?

16 A. Yes, they are all aware I am in New York
17 giving testimony.

18 Q. For the Securities and Exchange
19 Commission?

20 A. I don't know if I told them for the
21 Securities and Exchange Commission, but they
22 understand the scope of what's going on with Ken
23 Jowdy and --

24 Q. Just so we are clear, have you informed
25 your clients that you are giving testimony before the

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1 Securities and Exchange Commission?

2 A. I am not sure all of them I have said it

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3 that directly to them, other than I am meeting with,
4 I have met with Securities and Exchange Commission
5 people and that I have been asked to come back for
6 separate interviews.

7 Q. I'm sorry again, but just so we are
8 clear, have you said to your clients, each of them,
9 "I have met with the Securities and Exchange
10 Commission, I am going to back for a second round of
11 interviews," or have you said, "I am going back for a
12 second round of interviews concerning the Jowdy
13 investigation and all of that"?

14 The question, I think, is specific.
15 Have you informed your clients that you are being --
16 or that you are giving testimony before the
17 Securities and Exchange Commission?

18 A. I don't recall specifically.

19 Q. Have you informed your clients that
20 there was a federal lawsuit brought against you by
21 the Securities and Exchange Commission seeking
22 production of documents?

23 A. Yes.

24 Q. You disclosed that to each one of your
25 clients?

0669 1 A. I believe I told each one that I was
2 asked to produce any and all documents related to
3 everything that I have done, they have done, we've
4 done.

5 Q. Did you tell your clients specifically
6 that there was a lawsuit brought seeking those
7 documents?

8 MR. STOLPER: I don't know if that's
9 accurate.

10 MR. CASTANO: Well, we did bring a
11 lawsuit.

12 MR. STOLPER: It's an enforcement
13 subpoena.

14 MR. CASTANO: Fine.

15 Q. Did you tell clients that the SEC
16 brought an enforcement proceeding against you seeking
17 compulsion of documents from you?

18 A. I don't think I used those specific
19 terms because it wouldn't be relevant to them, but if
20 I can say it in layman's terms, I told them that
21 there has been a formal request made in New York for
22 me to turn over any and all documents related to
23 anything that we have done as a group, speaking about
24 myself and my clients, and that I've complied with
25 that request and turned over a significant number of

0670 1 documents.

2 Q. Just so we are clear, did you tell your
3 clients that the SEC filed suit against you seeking a
4 subpoena enforcement action for you to produce
5 documents?

6 MR. STOLPER: I am going to object to
7 that question. I don't think it's an accurate
8 characterization. I also think it is a bit
9 misleading and he has already asked and answered it.

10 MR. CASTANO: No. He said there is a
11 formal request for documents. The question is very
12 specific.

13 Q. We have filed a lawsuit against you --

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14 MR. STOLPER: That's your terminology.
15 MR. STEPANIUK: Just so we can agree on
16 terminology, why don't we call it a subpoena
17 enforcement proceeding.

18 Q. Did you tell your clients that the SEC
19 in federal court filed a subpoena enforcement action
20 against you?

21 A. In my own words, yes.

22 Q. Did you say that it was filed in federal
23 court?

24 A. Until you just said it, I couldn't tell
25 you which court it was filed in.

0671
1 Q. Did you review the subpoena enforcement
2 documents that were filed against you?

3 A. I believe I saw them.

4 Q. Did you see that it was filed in federal
5 court?

6 A. I apologize, because I am, although I
7 have been an acting litigation manager for the last
8 three or four years, a lot of this is foreign
9 territory to me because I am not an attorney. So to
10 me court is court, and I continue to learn as I go
11 along.

12 So I was very clear with all of them,
13 not to mince words again, but I was very clear that
14 you guys made a formal request in New York court to
15 have me turn over any and all documents related to
16 any and all activities in the broadest scope.

17 Q. So we are clear, you told your clients
18 that the SEC, not you guys, the SEC in court has
19 requested documents from me?

20 A. I believe so.

21 Q. When you say you believe so, it was only
22 six months ago, do you know for certain whether you
23 told your clients whether the SEC had requested
24 documents from you in court?

25 A. To the best of my recollection, I

0672
1 believe that is true.

2 Q. So if we were to speak with each one of
3 your clients and ask that question, they would say,
4 "Yes, Mr. Kenner told us that the SEC sought
5 documents from us in court"?

6 A. I don't see why they wouldn't.

7 MR. STOLPER: To be clear, there is a
8 transcript, so I will state this: The U.S.
9 Attorney's Office is conducting its own
10 investigation, as I am sure you are well aware, about
11 Mr. Jowdy and perhaps others, and FBI agents have
12 reached out and investigators have reached out to all
13 of his clients at varying times and degrees. And
14 most of those clients and people that you are asking
15 him about now, live outside of New York and have,
16 because -- I am not going to speak to the causes as
17 to why, but the actions of the SEC and the actions of
18 the U.S. Attorney's Office, all relating to Jowdy are
19 sometimes viewed without the separation and
20 distinction that you would otherwise appreciate or
21 think of.

22 So when people are -- when he is
23 dialoguing with his clients, sometimes the
24 distinction between what the U.S. Attorney's Office

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25 is doing and what the SEC is doing and what he is
0673

1 doing, in response to either of those things, is not
2 always clear, because to everybody, including Phil,
3 this is really about Jowdy, Jowdy's fraud, and what
4 are we doing to collect those monies and hold him
5 accountable, both here and in Mexico.

6 And I left out Mexico, but it is all
7 part of the same dialogue that he is having. So you
8 are asking for a precise pinpoint, in your mind
9 accurate questions about did he tell his clients
10 about the SEC enforcement action in New York. And he
11 is testifying here under oath, and I have been privy
12 to some of those conversations, and the intent is to
13 share information about what is going on.

14 If that's your concern, that's certainly
15 what is happening. But I don't know if the level of
16 precision that you are asking him to respond to is in
17 place. And that's part of dilemma with your
18 question.

19 MR. CASTANO: Again, the record speaks
20 for itself. I don't know if I agree with everything
21 you said or disagree with it.

22 Mr. Kenner does have approximately
23 twenty clients currently and one of the questions to
24 Mr. Kenner was --

25 MR. STOLPER: Do you have twenty
0674 clients now?

1 MR. CASTANO: I said approximately.

2 THE WITNESS: Approximately.

3 MR. CASTANO: -- whether those clients
4 he represents and is compensated by are aware of the
5 SEC filing an action in court to get documents from
6 you.
7

8 Q. So, again, I think your testimony is,
9 tell me if I am wrong, that, yes, I let all of my
10 clients know the SEC filed a court action to get
11 documents from me?

12 A. To the best of my knowledge, yes.

13 MR. STOLPER: It could be as equally
14 accurate that he has informed all of his clients that
15 he is cooperating with the SEC, he has produced a
16 large number of documents and has agreed voluntarily
17 to come --

18 MR. CASTANO: This is not voluntarily.
19 This is pursuant to subpoena.

20 MR. STOLPER: Well, that level of
21 precision he doesn't have to share with clients.

22 MR. CASTANO: That is not the question.
23 The question is: Did he tell them. His
24 answer is: I believe so.

25 Q. Do you know for certain whether you told
0675 them?

1 A. To the best of my recollection, yes.

2 MR. STOLPER: Did you tell them that
3 you had to be here or that you were here?

4 THE WITNESS: I don't --

5 MR. CASTANO: That is not the question.

6 Q. The question was very specific.
7 Did you tell your clients that the SEC
8 had filed an action in court to compel document
9

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10 production from you?

11 A. I do not use those terms.

12 Q. Did you tell your clients that the SEC
13 had filed an action in court to get documents from
14 you?

15 A. Yes.

16 Q. Did you tell your clients that the SEC
17 had filed in court an action against you to compel
18 your testimony before the SEC?

19 A. I don't recall.

20 Q. Do you think that's something your
21 clients should know, especially given the fact that
22 you advise them on financial matters among other
23 things?

24 A. Well, I believe what I represented to
25 them was as a result of the filing, the federal

0676 1 filing, as you suggest, to subpoena production of
2 documents, that I have been asked to come to New York
3 and I have come to New York to go through those
4 documents and any other questions that you guys have.

5 I don't know if the level of precision
6 that you are asking the question even would register
7 with a number of my clients. So, again, in the
8 context of was there an action filed to procure
9 documents from me by the SEC, yes. Are there ongoing
10 interviews, investigation, et cetera, based on your
11 actions in the federal court, I assume, of New York
12 to make that happen. Yes, they are aware. They are
13 also aware I am here for the second time, and I also
14 told them this may not be the last time.

15 BY MR. STEPANIUK:

16 Q. In those conversations, were you asked
17 what questions you were asked while you were here?

18 A. No, I don't believe so.

19 Q. Were you asked by any of your clients
20 what subjects were covered while you were here?

21 A. I believe the topics that they were
22 interested in were did we cover Mexican Ken Jowdy
23 issues. And I told them yes, we talked about Ken
24 Jowdy and Mexico, and they said good.

25 Q. Who asked those questions?

0677 1 A. I don't recall specifically.

2 Q. Apart from being asked what topics were
3 covered, did you, yourself, inform any of your
4 clients about the subject matter of your testimony
5 the last time you were here?

6 A. I don't believe so.

7 Q. What else, if anything, did you and your
8 clients discuss with respect to your experience here
9 in New York?

10 A. There were a number of questions from
11 clients who I don't recall specifically who they
12 were, but the general questions were: were you able
13 to talk about the money we gave Ken Jowdy and how we
14 feel about not having it back?

15 And I said in general, yes, we talked a
16 lot about Ken Jowdy and the monies that changed
17 hands.

18 Q. And did you tell them anything else?

19 A. I don't think so.

20 These are very simple people who just

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21 want to know that I am still fighting for them here
22 in and in Mexico to recover those funds from Ken
23 Jowdy.

24 Q. In the course of your conversations
25 about your appearance here today or proceedings filed

0678 1 in court with respect to documents and testimony, did
2 you inquire as to any of your clients as to whether
3 they have been contacted by the SEC?

4 A. I don't believe I asked any of them.

5 Q. Other than your clients, as we have been
6 discussing and your attorney obviously, with who
7 else, if anyone, have you discussed your experience
8 here in New York before us?

9 A. I believe it has been limited to clients
10 and my attorneys.

11 MR. STOLPER: Did you talk to Sergei
12 Gonchar about the SEC?

13 THE WITNESS: I don't think I did.

14 MR. STOLPER: You may want to clarify.

15 A. Sergei is not a client of mine at this
16 time.

17 MR. CASTANO: The questions were
18 concerning current clients about the SEC's
19 investigation.

20 MR. STOLPER: I didn't realize Sergei
21 wasn't a current client.

22 BY MR. STEPANIUK:

23 Q. Let me ask this: Would any of your
24 answers to my questions have changed if we were to
25 include former clients in the questions?

0679 1 A. If I can paraphrase, have I spoken with
2 any of my former clients to discuss --

3 Q. Either your appearance here before us or
4 the court proceeding that we filed with respect to
5 documents?

6 A. I don't believe so because, as I sit
7 here today, I don't believe I am in contact with any
8 of my former clients or have been in a very
9 significant period of time.

10 Q. How did it come to be that Sergei is no
11 longer a client?

12 A. My opinion is that Sergei finally got
13 fed up with the legal process, not understanding it,
14 and ended up a very manipulated kid in an ongoing
15 business relationship he has with Tommy Constantine,
16 who took approximately \$2 million from Sergei.

17 Q. When is the last time you spoke with
18 Sergei?

19 A. We had communication in the last few
20 weeks.

21 Q. What was the subject of that
22 communication?

23 A. I had sent him a message asking if he
24 wanted to give me a call, I had some important
25 information for him about a California case.

0680 1 Q. Does that case have anything to do with
2 anything we talked about here today?

3 A. He is one of two defendants left in a
4 lawsuit that Ken Jowdy brought upon about ten of us
5 for malicious prosecution.

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6 Q. When did Sergei cease being your client?

7 A. Six to nine months ago perhaps.

8 Q. Other than Sergei, is there anyone else
9 that was a client at the time of the investment
10 transactions we are discussing here today but is no
11 longer client?

12 A. I think the majority of the guys. It
13 has been a static group.

14 Q. Anyone other than Sergei Gonchar that is
15 no longer a client?

16 A. Not that I can think of.

17 BY MR. CASTANO:

18 Q. You mentioned \$2 million that he lost
19 through Tommy Constantine.

20 Were those Tommy Constantine related
21 businesses?

22 A. Yes.

23 Q. Between the Tommy Constantine related
24 businesses and the Diamante entities and the Hawaiian
25 entities, did Mr. Gonchar invest approximately or

0681 1 become a member of an entity for \$4 million?

2 A. I'm sorry, I got lost in that question.

3 Q. No problem.

4 Between all the various entities that
5 Mr. Gonchar has invested in, be it the Hawaiian
6 entities, the Mexican entities that we have discussed
7 last few days, the Diamante Air Group, and various
8 other investments he might have made through
9 investments in Eufora, for example, do you know if
10 Mr. Gonchar invested approximately \$4 million in
11 these entities?

12 A. That sounds approximately right.

13 Q. And out of that \$4 million, do you know
14 if Mr. Gonchar has received anything back for those
15 investments in those various entities?

16 A. I can't speak for what he has done with
17 Tommy Constantine, although I do know Gonchar was
18 paid monthly fees by Constantine on one of the deals,
19 I believe the Eufora deal.

20 In the Hawaiian investment, he was
21 repaid in '06 about 40 percent of his initial
22 investment.

23 Q. Along with all the other clients?

24 A. Along with all other clients.

25 The Cabo San Lucas and Diamante del Mar

0682 1 investments have been subject to ongoing litigation
2 here and in Mexico because of Jowdy's
3 misappropriation of those funds, so none of us
4 received anything in those two deals for our
5 investments.

6 Jowdy defrauded both Gonchar and the
7 Diamante Air deal leaving us with a million dollar
8 debt, as it states in his affidavit.

9 I think that covered all the entities
10 you were asking about.

11 Q. The 40 percent that came to Little Isle
12 IV in 2006, that came from Lehman Brothers?

13 A. Yes.

14 Q. Was every investor paid 40 percent of
15 whatever their investment was?

16 A. Yes.

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Q. So if you invested \$1 million, you got 40 percent back, if you invested \$100,000, you still got 40 percent back?

A. That's correct.

BY MR. SMITH:

Q. It was 40 percent of the total investment that each investor had paid up to the point of payment from Lehman Brothers?

A. That is correct.

BY MR. CASTANO:

Q. Has anyone suggested to you what answers you should give or what your testimony should be here before the Commission?

A. No.

Q. Have you told or suggested to anyone what they should say or what answers they should give in any SEC testimony?

A. No.

Q. Have you told or suggested to anyone what to say or what answers they should give before any grand jury or criminal investigative body?

A. No.

MR. CASTANO: Mr. Kenner, at this time, we are going to go off the record. We have no further questions for today. Oftentimes, we have to call people back as we learn more information. I hope that doesn't happen, but it is a possibility. If that does happen, we will reach out to your attorney, Michael.

THE WITNESS: Okay.

MR. CASTANO: Before we go off the record, do you want to clarify anything?

MR. STOLPER: The only thing I would clarify was that I think in your line of questioning,

which may not come through in the transcript, whether he disclosed that the SEC has sought enforcement of subpoenas to his clients, I think that the suggestion in your question was that it was something negative that he should disclose to his clients as sort of a warning or red flag to his clients who are relying on him.

And I think that the conversations that I have been a part of, without waiving privilege, and also my own view is that my view of SEC's involvement in this whole Diamante del Mar, et al, is a welcome one and that we and Mr. Kenner, are really looking to the SEC to enforce the securities laws against Mr. Jowdy and those who did wrong here. And we see it as a welcome thing, as a positive thing.

So the tenor of the conversations with Phil's friends, co-investors, clients, is that this is a welcome thing and that maybe because we are having this direct communication with the SEC, and then perhaps subsequently with the U.S. Attorney's office, that maybe they will finally get some justice out of this.

And I know I have said that off the record with you and I just wanted to clarify that in response to that line of questioning. Just a point

of information.

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MR. STEPANIUK: Just to say something in response, nothing about our questions suggested one way or the other that we want people to tell other people that they appear here as a general proposition. Obviously, there are circumstances under which that is appropriate. But as a general matter, nothing about our questions suggests that we expect all witnesses to tell other interested parties that they are appearing here today. In case that's not clear for anybody who might ever read this transcript.

MR. STOLPER: Good clarification. It certainly created confusion on this side of the table.

MR. CASTANO: We also don't represent anyone other than the Commission. We don't speak for the U.S. Attorney's Office or any other body. We only speak for the Commission.

MR. STOLPER: Understood.

MR. CASTANO: All right, we are off the record at 5:38 p.m.

(Time noted: 5:38 p.m.)

I N D E X

WITNESS	EXAMINATION BY	PAGE
P. Kenner	Mr. Castano	445

EXHIBITS

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SCOPIST CERTIFICATE

I, MARGARET EUSTACE, hereby certify that the foregoing transcript consisting of 247 pages is a complete, true and accurate transcript of the investigative hearing, held on Tuesday, August 16, 2011, at 3 World Financial Center, New York, New York, in the matter of DIAMANTE DEL MAR.

I, further certify that this proceeding was reported by Margaret Eustace and that the foregoing transcript has been scoped by me.

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Margaret Eustace

Date

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
REPORTER'S CERTIFICATE

I, Margaret Eustace, reporter, hereby certify that the foregoing transcript of 247 pages is a complete, true and accurate transcript of the testimony indicated, held on August 16, 2011, at 3 World Financial Center, New York, New York, in the Matter of DIAMANTE DEL MAR.

I further certify that this proceeding was reported by me and that the foregoing transcript was prepared under my direction.

Margaret Eustace

Date

PROOFREADER'S CERTIFICATE

In the Matter of: DIAMANTE DEL MAR
Witness: PHILIP KENNER
File Number: NY-8125
Date: August 16, 2011
Location: 3 World Financial Center,
New York, New York

This is to certify that I, Margaret Eustace, the undersigned, do hereby swear and affirm that the attached proceedings before the United States Securities and Exchange Commission were held according to the record and that this is the original, complete, true and accurate transcript that has been compared to the reporting or recording accomplished at the hearing.

MARGARET EUSTACE

Date